~~Wm. L. Storrs.~~

~~A. C. Taylor~~
~~Sept. 30th 1835~~

E. A. Bulkeley

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REPORTS

OF

CASES

Argued and Determined

IN THE

SUPREME JUDICIAL COURT,

OF THE

COMMONWEALTH OF MASSACHUSETTS.

VOL. IV.

CONTAINING THE CASES FOR THE YEAR 1808.

By DUDLEY ATKINS TYNG, Esq.
Counsellor at Law.

SECOND EDITION.

EXETER:

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF SUFFOLK.

MARCH TERM, 1808.

AT BOSTON.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK,
HON. SAMUEL SEWALL,
HON. GEORGE THATCHER,
HON. ISAAC PARKER, } JUSTICES.

WILLIAM COFFIN *versus* MICAJAH COFFIN.

THIS action was originally commenced at the court of common pleas for the county of *Nantucket*, to which both the parties belong, October term, 1805. The declaration is in case for slander, and after the usual allegations respecting

This court is competent to decide on a plea of privilege pleaded by a member of the house of representatives, in bar to an action for slander.

The freedom of deliberation, speech, and debate, secured by the declaration of rights to each house of the legislature, is rather the privilege of the individual members, than of the house as an organized body: being derived from the will of the people, the members are entitled to it, even against the will of the house.

The article securing this freedom ought to be construed liberally, that its full design may be answered: and it extends to every act resulting from the nature of the member's office, and done in the execution of it, and exempts him from prosecution for every thing said or done by him, as a representative, whether according to the rules of the house or not.

So if he is sitting on a committee in a lobby, or in a convention of the two houses out of the representatives' chamber.

A representative is not answerable in a prosecution for defamation, if the words charged were uttered in the execution of his official duty, although spoken maliciously; nor if not uttered in the execution of his official duty and not maliciously, or with intent to defame.

When in an action for a tort, the damages found by the jury are so great, that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or courruption, the court may set aside the verdict, and award a new trial.

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vs.
Coffin.

the plaintiff's goods name, fame and reputation, charges the defendant with speaking and publishing, in the hearing of *Benjamin Russell* and other good citizens of the commonwealth, of and concerning the plaintiff, the following false feigned, scandalous, malicious and opprobrious words, *viz.* "*That convict,*" thereby meaning that the plaintiff had been convicted of some felony, or other infamous crime, in some court having competent jurisdiction of such offences: and when the said *Russell* said to the defendant that he did not comprehend him, the defendant added these words, "*Did you never hear of the affair of the* Nantucket *Bank?*" Thereby meaning a late robbery and theft committed by some person or persons at the *Nantucket* bank: whereupon the said *Russell* observed to the defendant that the plaintiff had been honourably acquitted by the jury in that affair: to which the defendant replied, "*that does not make him the* "*less guilty,*" thereby meaning and intending that the said *William* was guilty of the crimes of theft and robbery, and had stolen the money then lately stolen from the *Nantucket* bank.—The plaintiff lays his damages at five thousand dollars.

The defendant by leave pleaded two several pleas at the court below, 1st. The general issue of not guilty, which was joined by the plaintiff.

2. In bar, that the plaintiff "his action aforesaid thereof against him ought not to have or maintain, because, protesting that he the said *Micajah* did not, in the presence and hearing of divers good citizens of this commonwealth falsely and maliciously speak and publish the defamatory words mentioned in the plaintiff's declaration, as the plaintiff has therein alleged, the said *Micajah* for plea says, that by the constitution of this commonwealth, it is declared that the freedom of deliberation, speech and debate in either house of the legislature of this commonwealth cannot be the foundation of any prosecution or action in any other court or place whatsoever: and because the said *Micajah* and the said *Benjamin Russell*, at the time the said words are alleged to have been spoken, were members of the house of representatives, one of the houses of said legislature, and the said supposed words, if spoken, were spoken by the said *Micajah* to the

said *Russell* in deliberation in said house, while the same was in session, and some of the members were there, and particularly the said *Micajah* and the said *Russell*, deliberating concerning the appointment of a notary publick: and the said words, if spoken, had relation to the subject in deliberation: wherefore the said *Micajah*, at the time and place mentioned in the plaintiff's declaration, spoke and uttered the words therein mentioned of and concerning the plaintiff, as he the said *Micajah* lawfully and constitutionally might do, and this he is ready to verify; wherefore the said *Micajah* prays judgment if the plaintiff his action aforesaid thereof against him ought to have and maintain, and for his costs"—

By Isaac Coffin.

To this second plea the plaintiff replied "that notwithstanding any thing in the said plea of the said *Micajah* alleged, he the said *William* ought not to be barred from having and maintaining his said action against him the said *Micajah*, because he says that, at the time and place, when and where the said false, feigned, scandalous, opprobrious and defamatory words were by the said *Micajah* spoken and published of and concerning him the said *William*, in manner and form as he has alleged in his declaration, the said *Micajah* of his own wrong, and without any such cause as is by him in his said plea alleged, spoke and published the said words: and this the said *William* prays may be enquired of by the country. *By Kilborn Whitman.*

And the said *Micajah* doth the like.

By Isaac Coffin.

Both these issues were found for the plaintiff at the court of common pleas, in *Nantucket*, and his damages assessed in the sum of fifteen dollars. From the judgment rendered below on this verdict both parties appealed to this court, which is by law holden for the counties of *Suffolk* and *Nantucket*, and the same issues came on to be tried before *Parker, J.* at the last November term.

From the report of the judge who sat in the trial, it appears that the facts in the case were testified to by *Benjamin Russell*, and member of the house of representatives, and were in substance as follows. That in the session of the legislature, June, 1805, *William Coffin*, the plaintiff,

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vs.
Coffin.

with whom the witness had some acquaintance, and of whose integrity he had a high opinion, applied to him to move a resolution in the house, authorizing the appointment of an additional notary publick for *Nantucket*. The witness asked and obtained leave to lay on the table a resolution for that purpose. *Micajah Coffin*, the defendant, rose in his seat, and asked where the member (meaning the witness) obtained his information of the facts, upon which the proposed resolution was founded. In reply the witness observed that his information came from a respectable gentleman from *Nantucket*.

The resolve passed, and the speaker had taken up some other business, when the defendant crossed the house, and came to the place, where the witness was standing, talking with several gentlemen, in the passage-way, within the walls of the house, and asked the witness who the respectable gentleman was, from whom he had received the information, which he had communicated to the house? The witness observed carelessly, it was perhaps one of his relations, and named *Coffin*, as very many of the *Nantucket* people were of that name.

On perceiving the plaintiff sitting without the bar, behind the speaker's chair, the witness pointed to him, and told the defendant *that* was the gentleman, from whom he received the information. The defendant looked towards him, and said "*What, that convict?*" The witness was much surprized at the expression, and asked the defendant what he meant: he replied, "*Don't* thee know the business of the* Nantucket *Bank?*" The witness replied, "*Yes, but he was honoura-*
"*bly acquitted.*" The defendant then said, "*that did*
"*not make him the less guilty, thee knows.*"

The witness, being asked whether the house were not then proceeding to the choice of a notary publick for *Nantucket*, answered, No: that this conversation took place a little before one o'clock, and that the choice was not until the afternoon session, or the next day: being asked whether the plaintiff was not a candidate for that office, he answered, No, and he afterwards recollected that one *Hussey* was the candidate.

* The defendant is of the religious sect, called friends or quakers.

No contradictory evidence being offered by the defendant, the principal question, made by his counsel, was upon the plea of privilege.

The direction of the judge to the jury was in substance as follows, *viz.* That the words charged in the declaration being proved by one witness, whose recollection appeared to be very clear on the subject, and no evidence being offered to contradict his testimony, they would probably not hesitate much, as to finding the first issue for the plaintiff.

That as to the matter of defence, which seemed alone relied on, *viz.* that the speaking of the words was justifiable under the clause of the constitution, which provides for the freedom of speech, deliberation and debate, in either house of the legislature, this was partly a question of law, and partly of fact; the whole however for the jury to determine, under such advice as should be given by the court:

That the question of law would be reserved for the consideration of the whole court, it being a constitutional question, and worthy of deliberate consultation and decision: that being however called upon, by his official duty, to declare the law to the jury, the judge gave it as his then present opinion that the facts proved were not such, as would amount to the justification contended for by the defendant: that in order to exempt a member of the legislature from the legal scrutiny, which every other man must submit to, if he traduce the character of another, it should appear that the words, charged as dafamatory, were spoken in the course of legislative business, under the forms prescribed by the house for the conduct of its members; that it could not be supposed, that the framers of the constitution intended to shelter the legislators from punishment, for any violation of the rights of others, further than was necessary for their personal security and independence; and that, in his opinion, the freedom of speech, deliberation and debate of the defendant, as a member of the house of representatives, according to the true sense and meaning of the constitution, was not infringed by the maintenance of this action against him.

The subject of damages, the judge observed, was so entirely and exclusively within the province of the jury, that

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he should say nothing to them upon it, except to caution them, on the one hand, not to give exhorbitant damages; and, on the other hand, if they were satisfied from the facts that the plaintiff ought to recover, not to turn him off with such slight damages, as to induce one so situated rather to seek personal revenge, than resort to the laws of his country: that the degree of malice, in an action of this kind, would properly measure the damages: if the jury believed the words to have been spoken in haste, and in the heat of the moment, without a deliberate and malicious intent to injure, they would of course give small damages: on the other hand, if the evidence satisfied them that the words were spoken from malignant motives, the damages would be greater.

The jury returned a verdict against the defendant for *two thousand five hundred dollars* damages. A motion was made by his counsel for a new trial on the question of law reserved by the judge, and also for the excessiveness of the damages; and the action was continued to this term for a decision upon that motion.

And now the court observed that they would first hear an argument on the question of law saved at the trial, reserving the question on the subject of damages to be spoken to afterwards, if the defendant should not prevail on the first point: *Dexter* and *the attorney general*, *Bidwell*, being of counsel for the defendant, and *B. Whitman* for the plaintiff.

The attorney general apprehended that, although the defendant's plea in bar was not penned with technical precision, the question of privilege was by it sufficiently brought before the court to admit a discussion of that question upon the present motion.

The motion then may be considered as presenting to the court a constitutional question, important in itself, as indeed any question is which affects the constitution; and of additional importance and peculiar delicacy, inasmuch as it respects the limits of jurisdiction between two independent, co-ordinate departments of our government, the judiciary and one branch of the legislature.

To avoid a conflict of jurisdictions, and to settle the question on its true principle, it is necessary to consider the na-

ture of the privilege claimed, and the constitutional ground, on which the claim is founded.

Privilege has been said to be an odious plea, in derogation of common right, and therefore not to be favoured in law, but to receive a restrictive construction. However just this observation may be when made with reference to private and personal claims of exemption from publick duties or services, for the ease or emolument of the individual; it can have no application to such privileges as are conferred by the constitution upon publick functionaries for the benefit of the people at large. Of a claim thus founded the principles of our free government require the most favourable allowance. Such is that which is asserted by the defendant in this case. He has not claimed an exemption from responsibility for what he said of the plaintiff: he has only insisted that the house of representatives, of which he was then a member, and in which he spoke the words in question, and not the judicial courts, had the cognizance of that subject.

The constitution declares that "*The freedom of deliber-* "*ation, speech and debate, in either house of the legisla-* "*ture, is so essential to the rights of the people, that it* "*cannot be the foundation of any accusation or prosecu-* "*tion, action or complaint, in any other court or place* "*whatsoever.*" *Dec. of Rights, Art.* 21.

The house of representatives are also empowered by the constitution "*to settle the rules and orders of proceedings* "*in their own house.*" [*Cap.* 1. *Sect.* 3. *Art.* 10.] They alone can judge of those rules and orders, enforce their observance, and punish a member for any violation of them.

The constitution having thus vested the house with *the freedom of deliberation, speech and debate*, in the most absolute and exclusive terms, and having also given them a discretionary controul of the manner, in which that freedom shall be exercised; it results that they are the sole judges of the extent of the privilege, and the only tribunal, to which the members are responsible for any abuse of it.

This is not a novel doctrine. It is founded on a principle as old as the history of jurisprudence. The decision of either house of parliament, respecting any subject of parlia-

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mentary privilege, has for ages been holden to be conclusive upon the courts of law. "When in 31 *Hen.* 6. the house of lords propounded a question to the judges, touching the privileges of parliament, the chief justice, *Sir John Fortescue*, in the name of his brethren, declared, that "they ought not to make answer to that question; for *it hath not been used aforetime that the justices should, in anywise, determine the privileges of the high court of parliament;* for it is so high and mighty in its nature that it may make law, and that which is law it may make no law, and the *determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices.*"(1).

Mr. *De Lolme*, whose doctrine, and even language, the framers of our constitution have adopted and copied, and whose treatise was written since the privileges of parliament were in some measure defined by the bill of rights, says, "These two houses enjoy the most complete freedom in their debates, whether the subject be *grievances*, or regulations concerning government matters of any kind: no restriction whatever is laid upon them; they may start any subject they please.—And in short, what makes the freedom of deliberating, exercised by the two houses, really to be unlimited, unbounded, is the privilege, or sovereignty, we may say, enjoyed by each *within its own walls*, in consequence of which *nothing done or said in parliament is to be questioned in any place out of parliament.*"

Sir William Blackstone, in his commentaries, quotes the declaration of the chief justice *Fortescue* and his brethren with approbation, and gives it the sanction of his own authority, as established law in his day. The doctrine is well settled and understood. A declaration of privilege by either house of parliament is always respected by the judicial courts, as evidence of the privilege declared. And it is believed that this honourable court will receive, with equal respect, a declaratory resolve of our own house of representatives, relative to their privilege of free deliberation, speech and debate.

Whitman requested the attorney general to state to the court the purpose, for which he introduced the resolution.

(1) 1 *Black. Com.* 164.

Bidwell said he offered it for two purposes : 1st. To shew the claim of the house, and of the defendant as a member of that house. 2d. As an authority decisive of the principle, on which the question before the court ought to be decided.

Whitman objected to the reading of the resolve, and observed that it was merely a declaration of the house, made in their own favour, and that upon the application of this defendant since the trial of the cause.

Bidwell, in answer to the objection, said that the resolve was a general one, not predicated upon, nor alluding to this particular case, but adapted to all cases coming within its general principle. As it respects a general principle, it can be of no importance, at what time, or upon what occasion it was adopted. It is sufficient that the house have made a decision on a subject within their jurisdiction. Such a decision is entitled to respect, as an authority, according to the rule quoted from *Blackstone*, and agreeably to the nature of our balanced government.

Whitman hoped the practice or the claims of the *British* parliament would not be considered as authorities *here*. We have a constitution of our own, which establishes this court, and not the house of representatives, as the supreme tribunal, to determine the true meaning of each part of the constitution, as well as of the laws.

The chief justice asked *the attorney general*, whether he contended that a declaration of privilege by one branch of the legislature was an authority to the same extent, as a similar declaration by either house of parliament.

Bidwell said he did not contend that it was so as to privileges generally : but only as to those privileges, which are granted by the constitution to the two houses, such as freedom of deliberation, speech and debate. Upon the subject of privileges, which the constitution has vested in either house, that house is the supreme court, whose decision, as to the nature and extent of the privileges, is final and conclusive. It cannot be reversed for error by any other court. No other tribunal can, without usurpation, undertake to consider whether it is erroneous or not. This is the true theory of our go v-

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ernment; and on this ground the declaratory resolve of the house, on the subject of the privilege in question, is offered.

The court admitted the resolution to be read, reserving for further consideration the effect of it. And it was read by *Bidwell* as follows,

"COMMONWEALTH OF MASSACHUSETTS,

In the House of Representatives, March 1st, 1808.

The house of representatives, impressed with their duty to protect the rights of their citizens, and the principles of the constitution, under the safeguard of which they assemble and deliberate for the publick good; and to guard, at all times, their own privileges against the undue interference of any other department of the government, do, therefore, RESOLVE and DECLARE, that words spoken by any member, within the walls of this house, relative to a subject under their consideration, either in their separate capacity, or in a convention of both branches of the legislature; (whether the member, speaking such words, addresses himself, in debate, to the chair, or deliberates and advises with another member, respecting such subject,) are alone and exclusively cognizable by this house: and that for any other tribunal or department of government to interfere with its authority, and take cognizance of words thus spoken, is a breach of the rights and privileges of this house, and a flagrant violation of that important article of the constitution, which expressly provides for "*the freedom of deliberation, speech and debate in each house of the legislature.*"

The attorney general proceeded. It is here decided and declared that words spoken by a member of the house, within its walls, although not addressed to the chair in formal debate, but communicated in conversation with another member, are within the constitutional privilege. The reason of this decision is obvious. The house being exclusively responsible for the manner in which the freedom of deliberation, speech and debate is exercised by its members, no other court has authority to decide whether the member uttering the words is in order or not; or what consequences he is to suffer, if out of order. Those are questions cognizable by the house alone. No other tribunal has a right to consider

whether he uttered them standing or sitting, with his hat on or uncovered, in his proper seat or in some other part of the house, in a publick address to the speaker or in private deliberation with another member, after the subject had been moved, or before any motion was made respecting it, within the rules of decorum, or in transgression of them. If they were spoken by a member in the presence of the house, during its sitting, in any manner suffered or not prevented by the house, they are within the constitutional freedom of deliberation, speech and debate in the house: and however improper they may be thought, they cannot be drawn into question "in any other court or place whatsoever."

Chief justice. Is the privilege confined to the immediate presence of the house? Would not the members of a committee sitting in a lobby and deliberating on a subject committed to them by the house, be as much protected, as if they were deliberating in the house?

Bidwell. Perhaps they would. That however is a point, which it may not be necessary to determine in deciding the question before the court. It is not the object of the defendant's counsel, in this argument, to ascertain with precision the utmost limits, to which the privilege may be extended: but to shew that it embraces every word spoken by a member of the house, while in actual session, however disorderly or improper; because for any disorder or impropriety the member is amenable to the house, which has the power to punish him for abusing his privilege, and to do justice to any person, who is the object of that abuse; not indeed in the form of damages, as in a court of law, but in one adapted to its own forms of proceeding, and not less satisfactory to an honourable mind.

Chief justice. Would you extend the privilege to actions as well as words? Suppose, for instance, one member should assault or beat another in the presence of the house; would he not be answerable in an action, or on an indictment in a court of law?

Bidwell. Unquestionably he would. For it is the freedom of deliberation, speech and debate only, and not of assaulting and beating, that is secured by the constitution. For other personal injuries and abuses, a member may be

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answerable or indictable; but not for any abuse of the freedom of deliberation, speech and debate in the house.

This principle is recognized in the case of lord *Abingdon* (2) who was prosecuted in the court of king's bench, for a libel. From the report of the case it appears "that lord A. having in the house of lords given notice of his intention to bring in a bill, the next session of parliament, to regulate the practice of attornies, had in the course of his speech, mentioned his having employed Mr. *Sermon*, of *Gray's Inn*, as his attorney, and after much invective, charged him with improper conduct in his profession, with pettifogging practices, and other matters highly injurious to his character. This speech his lordship read in the house of lords from a printed paper, which paper he had, at his own expense, sent and had printed in several of the newspapers. Lord *Kenyon*, in summing up the cause to the jury, said that as to the words in question, had they been spoken in the house of lords, and confined to its walls, that court [the king's bench] would have no jurisdiction to call his lordship before them, to answer for them as an offence." And yet had lord *Kenyon* been presiding in the house of lords, he would doubtless have pronounced the same words to have been disorderly and abusive, being uttered on a subject, respecting which there was no motion before the house, and being also of a personal and slanderous nature. Lord *Abingdon* was responsible to the house of lords, of which he was a member, for an abuse of his privilege: but he was not answerable in a judicial court for speaking the offensive words, although he afterwards rendered himself liable by publishing his speech in the newspapers.

That case is precisely in point. The words charged upon the present defendant were spoken in the presence of the house of representatives, which was then actually sitting, and of which he was a member. They were, in the language of lord *Kenyon*, confined to the walls of the house: and if it were competent for this court to make the enquiry, it would appear that they were, at least, as fairly within the rules of order, as the words of lord *Abingdon*. Until therefore the

(2) 1 *Esp. Rep.* 226.

defendant, in imitation of his lordship, shall publish in the newspapers what he said of the plaintiff, it is believed that this court has no more jurisdiction of the subject, than the king's bench had in that case.

Whitman agreed with the defendant's counsel that the question before the court was a great constitutional one, involving the construction of the twenty-first article in the declaration of rights. That declaration consists of certain political maxims or axioms, deliberately settled and established by the people of the state in the formation of their government, which were intended to operate as controuling rules over the exercise of any power delegated, by the constitution, or by laws made pursuant to it, to any publick functionaries or officers of government. And these axioms are all to be construed together, not to be taken abstractedly and pursued or considered separately.

In construing this, and indeed any other part of the constitution, little aid can be derived from precedents found in the proceedings of the *British* parliament, or of the judicial courts in any other country. No other country furnishes an example of a nation, peaceably and deliberately settling the principles of their government, and distributing and limiting the duties, powers and privileges of those who should be designated to fill the various departments and offices which were to exist under it. The *British* government indeed, in its practice, has considerable resemblance to those of our country ; but it can furnish us with no decisions applicable to the present question, as there is not, nor ever was, any written constitution in that country, controuling, in any degree, what has been called the omnipotence of the three estates of parliament. As to what is commonly, but, to say the least, very inaccurately called the constitution of *England*, it is nothing more than certain rights and privileges, which the two houses of parliament have wrested from the power of the crown in revolutionary days ; but especially those which the commons have, in their struggles with the monarchical and aristocratical branches of the government, been able to obtain, as concessions or grants, rather than as original rights,or principlesand axioms of an original compact.

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We contend that, under our own constitution, the judiciary power is an original, co-ordinate and independent branch of the government. It is through the medium of this branch that the citizen expects *to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character*(3).

It is a necessary principle,in every *government of laws and not of men*, that the supreme judiciary has the power of judging and finally determining on the extent and limits of jurisdiction belonging of right to every inferior judiciary tribunal,and also to every publick functionary and officer, and every other military,civil and judicial tribunal within the same government.

The plaintiff in this case having instituted a legal and proper suit for an injury alleged to have been received from the defendant; and the defendant having pleaded certain facts, which, he says, take away the jurisdiction of this court, it is of necessity that the court adjudge the point thus brought before them : in other words they must try and determine whether the house of representatives have, or have not, the exclusive jurisdiction of the ground of this action. Unless indeed it shall be said that the mere allegation of a party, or at most, the claim of the house of representatives, is to deprive the plaintiff of his common law remedy, and to oust this court of its jurisdiction. If the court find the cause of action to belong exclusively to the house of representatives, they will immediately stop their hands, they will proceed no further; but if they are satisfied that their jurisdiction is not taken away in the present case by the constitution, they will not deny the plaintiff the remedy he has sought in a regular, legal and orderly manner.

If the house of representatives, can, by their own act, determine ultimately and exclusively the extent of their own powers and jurisdiction, and if they have a right to say,in any instance, that this court cannot interfere with its jurisdiction, to redress a private wrong or a publick mischief, it will follow that whenever the house of representatives chooses by its interference, to take away the subject's remedy, the people must submit to the oppression, or resort to arms in order to

(3) *Declaration of Rights, Art.* 11.

dissolve the government and produce a revolution. For the house of representatives cannot be impeached, nor removed in any constitutional and orderly manner.

On the other hand if, as we contend, this court have authority to interfere in every case of private injury or publick wrong, which may be regularly brought before them, and to decide the limits of jurisdiction and privilege of all other tribunals, the people have a certain remedy for any unconstitutional, oppressive or imbecile exercise of the powers of this court, *viz.* by impeachment, or address, to procure the removal of any or all the justices, whose conduct may call for the application of those high constitutional remedies: and this without dissolving the social compact, or causing any violent shock in the government.

Presuming then that this court will find itself competent to decide the question of jurisdiction, we shall contend that in the present case the house of representatives have not constitutionally any jurisdiction of the facts which are the foundation of the present action.

The provisions of the constitution ought to receive a legal and technical construction, if consistent with the apparent intention of the framers of the instrument: so as, if possible, to prevent the mischief intended to be guarded against, or to obtain the good intended to be produced: in other words, to effectuate the intentions of the people in that fundamental act.

Thus it is apparent that, by the twenty-first article in the declaration of rights nothing more was intended, than to secure to the individual members of the two houses the independent exercise of their offices, the privilege of doing whatever was proper and necessary for them to do as legislators. The words "*either house of the legislature*" cannot intend the walls or building which cover and surround the members. They plainly intend the aggregate assembly of members, organized, and in the exercise of the functions allotted to them. In the standing rules and orders of the house of representatives, there are more than fifty instances, in which the word *house* has the signification here contended for. And so long as a member is occupied as such, is actually in the exercise of his functions as a member, so long and no longer is he entitled to the privileges contained in that arti-

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cle, so long and no longer is he to be considered, for the purposes of that article, a member of the house.

Further we contend that, to be entitled to this high immunity and privilege, the member must be within the standing rules and orders of the house. By one of those rules it is provided that "*No member shall speak out of his place, nor without first rising and addressing the speaker, and shall sit down as soon as he is done speaking.*"

The *deliberation, speech* and *debate,* to which the constitution has annexed this great immunity, must intend the publick discussion of some subject under consideration, such speech and debate as is permitted by the rules and orders of proceeding, which the house has established to restrain and controul its members.

In a "Manual of parliamentary practice for the use of the senate of the United States," composed by the present president of the United States, a construction is given to a like provision in the constitution of the United States, which confirms the interpretation we contend for in the present case. The provision is in these words, "*For any speech* "*or debate in either house they shall not be questioned in* "*any other place.*" The commentary by Mr. *Jefferson* is, "*But this is restrained to things done in the house in* "*a parliamentary course*(4). *For he is not to have priv-* "*ilege* contra morem parliamentarium *to exceed the bounds* "*and limits of his place and duty*(5).

In the case of *The King* vs. *lord Abingdon,* the court expressly define the limits of the privileges of the lords. Lord *Kenyon* says, had the words been spoken in the house of lords, meaning no doubt in publick, open and orderly debate, the court of king's bench would have had no jurisdiction: but here the privilege stopped, and when the member caused his speech to be printed and published, he ceased to be protected.

So in the case at bar, had the defendant spoken the defamatory words complained of, or even words more slanderous; if

(4) *Rush.* 663.

(5) *Whitman* observed that the book from which he read not being paged, he could not cite the place where the passage is found.

such can be conceived in regular and orderly debate, the constitution would have protected him. But the facts were altogether otherwise. The subject was not then under consideration, was not before the house. The defendant was not in his place, did not address the house, nor the speaker. On the contrary he was at that moment breaking the orders of that body, from whom he now asks protection; he was bound to attend to the subject then before the house, and being wandering from his *place and duty*, forfeited, for the time, his claim of privilege.

Suppose that the plaintiff, instead of coming here to obtain satisfaction for the injury he has sustained, had applied by petition to the house of representatives, stating the facts, and praying their animadversion upon the defendant. Waiving for the present the futility of any remedy in the power of the house to furnish, they would have answered him, and properly too: "This was a private conversation between two members of our body relating to a subject not in debate at the time: we have no authority in the case: the courts of law are open to you; there you are at liberty to seek your remedy, and there you will undoubtedly find it."

Dexter, in reply, observed that in the discussion of this question, very little aid could be derived from books of reports, as no adjudged cases were to be found on the point in question, and that this fact was a strong proof that courts of common law in *England*, would not hold cognizance of facts arising in parliament; otherwise we should find cases reported, as the passions excited in debate would compel parties to institute suits at law. For *English* authorities then we can resort only to elementary books and proceedings in parliament.

In our own country, however, we have a higher, and a more definite and explicit authority to recur to, an authority paramount to judicial decisions, and even to the most solemn acts of the legislature, *viz.* the constitution or frame of government, which was established by the people, as a restraint upon and an authoritative guide to every department and officer of the government. It is by this written constitution that the question now before the court must be decided.

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It is a question of no less delicacy than importance, and if not prudently discussed, and gravely adjudged, may produce an unfortunate collision between two co-ordinate branches of the government, each claiming to derive its rights, powers and privileges from the same original source.

Such a collision it is in every view desirable to avoid, as there is no superior tribunal having power to determine on the respective claims of the parties to the contest. And it will be avoided in this case by a decision of this court, that it is not competent to decide a question on the extent of privilege of a member of the house of representatives.

Unless the house of representatives have the exclusive power to decide, in every case, whether they have jurisdiction, there is an end to their independence. If this court can take cognizance of a fact, of which the house claim the *exclusive* cognizance, the decisions of the two tribunals, each claiming to be supreme, and having no common arbiter, may be contradictory. The mischiefs flowing from such a state of things, are as discernible as they are great.

It is not a new position that the two houses of the legislature have respectively the right to define their own jurisdiction: nor can inconvenience arise from it, more than from the authority claimed by the judicial courts to determine exclusively the limits of *their* jurisdiction, and to decide, in every instance, what is a contempt, and to punish it at discretion.—Such an authority is thought necessary to the independent exercise of their general jurisdiction: and it is difficult to conceive a reason applying on this point to the courts of common law, which does not apply with equal strength to the house of representatives.

Neither is there any inconvenience or mischief to be apprehended from ascribing to the house the jurisdiction claimed for them by the defendant in this suit, but what arises from supposing an abuse of their power.

But it is to be presumed that the decision of the house, in every case, will be what it ought to be. It is true they cannot award satisfaction, for a wrong done by a member to another member or to a stranger, in dollars and cents. But is this the only recompense an honourable man will be satisfi-

ed with, when his character has been traduced ? To such a man, would not a public apology and recantation be a higher satisfaction ? Would not the expulsion of the offender from that situation in which he had committed the offence, be as severe a punishment, and as satisfactory an atonement to a man of correct and liberal mind, as a pecuniary mulct ? To say this would not be done in the present, or in any supposable case, is presuming very improperly.

But if individuals may, in some solitary instances, fail of obtaining a satisfaction for an injury of the sort alluded to ; yet the public interest must be preferred to the claims of individual resentment, and even of individual justice, when they are incompatible with each other. The public interest demands the perfect freedom of every member of the legislature, while exercising his functions. The privilege of a member is the privilege of the house.

The very frame and nature of our government contemplates checks and balances in the different departments. If one scale preponderates, the balance is destroyed, and confusion must ensue. It is absolutely necessary to the peaceful and regular administration of the legislative, executive and judicial departments that they be respectively independent of each other. When in any case this court shall have solemnly decided that they have jurisdiction, it is not in the power of the house of representatives to say they have not, except by impeachment of the individual judges ; yet the judgment would still remain in force.

By the decision of this court, the question would be put at rest forever. If this is true, it is equally true that when the house of representatives, in exercising its constitutional jurisdiction, have made a decision in any case or upon any point, that question is also put at rest between the parties, and such decision cannot be revised or impeached by this or any other tribunal. It will not be denied that the house of representatives have constitutionally a judicial authority in certain cases, limited indeed as it respects the objects of it, but within those limits final and supreme. But this is destroyed, if another tribunal has authority to say that the house has it not in any particular case, wherein it claims it.

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A question of jurisdiction, like every other question, must be capable of receiving a final decision by some competent tribunal; and that court, which is lawfully authorized to determine finally on the general subject matter, must be competent to ascertain finally the limits of its jurisdiction: othwise contention must be eternal.

But if it were competent to this court to determine a question on the extent of jurisdiction of the house of representatives, we contend that the decision in this case, from the facts as they appear before the court, must be that the house of representatives have exclusive cognizance of the cause of action set forth.

The declaratory resolution of the house, which was read in the opening of the argument is not a new law, it is rather a judicial explanation of the law, as it stood: a practical exercise of their right to construe the constitution, so far as it relates to their own privileges. And it contains no extended or extravagant claim of jurisdiction; nothing more than is necessary to secure that freedom of deliberation, speech and debate, assured to them by the constitution.

They claim the exclusive cognizance of words spoken by a member, within the walls of the house, relative to a subject matter under consideration, either of the representatives alone, or of the two houses in convention: whether the member speaking the words addresses the chair, or deliberates with another member on such subject.

Now by "a subject matter under consideration," must be understood, not merely a subject at the very instant under debate: but the phrase must include one which has been before the house, and is not yet finally determined; and whether any other matter is before the house at the moment, cannot, in the nature and reason of the thing, make a difference. It is necessary to deliberate in various ways and forms. Subjects for instance are commonly referred to committees in their various stages. It is the duty of such committees to deliberate, and they must be protected in their deliberations, or the end of their appointment will be frustrated.

Whenever a measure is proposed to the house, it is the right, and it is the duty, of every member, to communicate

to his brethren the information he possesses, and to obtain such as he may need.

Further, the members have a right to deliberate and confer with each other on a measure not yet publicly moved, and they must be protected and privileged in the exercise of such right. Suppose, for example, a member contemplated an impeachment of a certain public officer, it would be his duty to confer with his brethren, and their duty to confer with him on the propriety and expediency of the proposed measure: to scrutinize the character and conduct of the officer. And shall it be said that for the exercise of this duty a member is amenable in this court in an action for slander? Is not a principal benefit and effect of the provision of the constitution annihilated by such a construction of it?

In the case before the court it appears that a motion had been laid on the table, which had not been finally acted upon. It was at the time then a subject of deliberation. Before the defendant could obtain the information he needed or wished for on the subject, another subject came before the house. He then took the orderly and proper course to obtain the information he had a right to obtain. In this state of things he spoke the words complained of. The question is not, what were the defendant's motives for speaking the words; what was his offence; whether the words were true or false, malicious or not; but whether he is liable to any other jurisdiction for that offence, be it what it may, than the house of representatives, in whose presence they were spoken; whether he is amenable in this court in this action for these words thus spoken.

The defendant had a right to take every lawful measure in his power to prevent what he might think an unnecessary or improper act. He might have persuaded Mr. *Russell* to move for a re-consideration of the resolve that had just passed. It is presumable that he spoke the words with that view. If he had succeeded in the intention, if he had, by this mean, procured a decision of the house conformed to his wishes, it would not be denied that the words were spoken relatively to a subject matter under consideration. But surely his failure of success cannot render him more liable to the plaintiff's action, than he would otherwise have been. It is

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possible also that he might suppose that the plaintiff was a candidate for the proposed appointment.

The rules of the house were cited by the plaintiff to shew that the defendant was not protected by them. But for this court to look into those rules, in order to determine whether the defendant is or is not protected by them, would be to decide the very question of jurisdiction, about which the parties are now contending. Those rules are adopted by the house for the preservation of decorum among the members, and for the orderly conducting of the business of the house. The very question, whether a member has or has not transgressed those rules, is proper to the house of representatives. They have prescribed the rules: they have affixed the penalty to the breach of them, and they claim the sole and exclusive right of applying the penalty in every case of a breach. Thus by Article xvi. of the section relating to the duties, rights, and decorum of the members; "When any "member shall be guilty of the breach of either of the rules "and orders of the house, and the house has determined he "has so transgressed, he shall not be allowed to speak or vote, "until he has made satisfaction, unless by way of excuse for "the same."

In fact these rules (and the same remark is a sufficient answer to the citations from *Jefferson's Manuel*, and to the authorities there cited) are intended as principles of conduct for the government of the members, and by which the speaker or presiding officer is to regulate their conduct. They can be no rule in a court of law. They are made for the regulation of a tribunal competent to execute them, and will probably govern there, but they are no authority to shew whether one tribunal or another has jurisdiction in any supposed case.— The house is the proper tribunal to explain and enforce their rules, and the house has decided that they alone have jurisdiction of such facts as appear in the present case.

The fifth article of those, from which the citation was just now made is this: "No member shall speak more than twice "to one question, without first obtaining leave of the house." Put the case that, in violation of this rule, a member speaks a third time, without first obtaining permission, and in that [illegible] speech, not being called to order, he uses words respect-

ing a citizen, which in any other place, would be clearly actionable : will this court say that he was out of order, and therefore amenable here : but that if he had spoken the same words in the second address he made to the house, no action would have lain against him in this court. They must say so, if by being guilty of a breach of the rules established by the house entirely for the orderly conduct of business, a member loses the protection and privilege which the constitution has provided for him.

The passage cited from *Blackstone* in the opening, states the law to have been from early antiquity, what it continued to be at the time of his writing, respecting the privileges of parliament. There is no case in the books, in which judicial courts have rendered judgment against a member for an act done in either house of parliament.

The case cited from *Espinasse* recognizes the principle that the court of king's bench had no cognizance of words spoken in the house of lords. Those words were highly indecent and calumnious ; and there was nothing then before the house, to which they had relation. Lord *Abingdon* merely signified his intention to make a certain motion at the next session of parliament, and then went into a scandalous aspersion of the character of a private citizen. Yet the court say they have no jurisdiction of slander thus wantonly and impertinently uttered. It is true, when the member came out of the place of his privilege, and, by a new and voluntary act, published the same slander, he became amenable to the justice of his country in her courts of common law. So long as the facts, whatever they might be, were confined to the parliament house, the court of king's bench would not enquire whether they were in the rules and orders of the house or not.

The court took time to consider the motion, and at an after day in the term the following opinion was delivered by

PARSONS, C. J. The plaintiff has commenced an action of the case, demanding damages of the defendant for an injury to his character committed by the defendant in maliciously uttering and publishing defamatory words, which imported that the plaintiff had committed felony by robbing the *Nantucket* bank.

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To this demand the defendant pleaded not guilty, and also, by leave of the court, a special plea in bar, justifying the speaking of the words, because as he alleged, at the time when they were spoken, he and *Benjamin Russell* were members of the house of representatives then in session, and that he spoke the words to *Russell*, in deliberation in the house, concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation.

The plaintiff, in his replication, denies these allegations ; and avers that the words were spoken by the defendant of his own wrong, and without such cause as he had alleged, and tenders an issue to the country. The defendant does not demur to the replication, but joins the issue thus tendered.

Both the issues came on to trial, and it appeared from the evidence, that when the words were spoken, the defendant and *Russell* were members of the house of representatives, then in session. The occasion, manner and circumstances of speaking them are thus related by *Russell*, the witness. He having some acquaintance with the plaintiff, and thinking highly of his integrity, was applied to by him to move a resolution for the appointment of an additional notary for *Nantucket*, the town represented by the defendant. *Russell* made the motion, and had leave to lay the resolution on the table The defendant, in his place, enquired where *Russell* had the information of the facts, on which the resolution was moved. The witness answered, from a respectable gentleman from *Nantucket*. The resolution then passed, and the speaker took up some other business. *Russell* then left his place, and was standing in the passage-way, within the room, conversing with several gentlemen. The defendant, leaving his place, came over to *Russell*, and asked him who was the respectable gentleman, from whom he had received the information he had communicated to the house ; *Russell* answered carelessly, he was perhaps one of his relations, and named *Coffin*, as most of the *Nantucket* people were of that name. The witness then, perceiving the plaintiff sitting behind the bar, pointed to him, and informed the defendant he was the man. The defendant looked towards him and said, " what that convict?" *Russell*, surprised at the question, asked the

defendant what he meant? replied, "Don't thee know the business of *Nantucket* bank?" Witness said, "yes but he was honourably acquitted." The defendant then said, "that did not make him less guilty, thee knows." It further appears that this conversation passed a little before one o'clock; that the election of notaries was not then before the house, but was made that afternoon, or the next day, and that the plaintiff was not a candidate for that office. And there is no evidence that the resolution laid on the table by *Russell*, and passed, or the subject matter of it, was ever after called up in the house.

It does not appear from the report that it was contended by the defendant, that the words testified to did not import the slander charged in the plaintiff's declaration, nor is the verdict objected to on that ground: the judge therefore directed the jury, that if they believed the testimony, the plaintiff had maintained the first issue. But the defendant insisted that the evidence supported the justification contained in the bar, and that by law the second issue ought to be found for him.

The question of law therefore arises on the second issue. Both parties had submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and the fact. To enable them to settle the fact, they were to weigh the testimony: that they might truly decide the law, they were entitled to the assistance of the judge. If the judge had declined his aid in a matter of law, yet the jury must have formed their conclusion of law as correctly as they were able. But the judge was officially obliged to declare to the jury his opinion of the law. If this be denied, as a matter not within the jurisdiction of the court, it must also be denied that the jury were legally authorized to decide on the law. The consequence of which would be, that when any defendant representative should plead his privilege in bar, whether the plea be true or false cannot be enquired into, because every such plea must involve both law and fact; and the judge must send the parties out of court.

If the judge was officially obliged to declare the law to the jury, he must necessarily take notice of the law, on which the defendant relied, and give it, according to his judgment,

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a sound construction, applicable to the issue on trial. The law relied on is the twenty first article of the declaration of rights.

This article he was obliged to notice and explain, according to what he judged to be its true intent and effect. If there had been any explanation of this article, by the act of any legislature, or by the judgment of any court, constitutionally obligatory on courts of law, such explanation is law, and ought to have governed the judge in his construction of the article. It is not pretended that, at the time of the trial any such act or judgment existed. The only aid, which the judge could receive, must have been derived from other parts of the constitution, and from the principles of the common law, by which sound rules of construction are established.

The judge accordingly gave to the jury his construction of the article, and declared to them his opinion, that the facts did not in law maintain the issue for the defendant: and the jury found a verdict for the plaintiff.

To this opinion of the judge the defendant excepted, and moves for a new trial; and on the correctness of it are we now to decide. As the jury found a verdict agreeably to the judge's direction, it is to be presumed that they were influenced by it: and if the direction was wrong, the cause ought to be again tried by another jury, uninfluenced by an erroneous opinion of the judge in a matter of law.

The twenty first article of the declaration of rights declares that "the freedom of deliberation, speech and debate in ei-
"ther house of the legislature is so essential to the rights of
"the people, that it cannot be the foundation of any accusa-
"tion, or prosecution, action or complaint in any other court
"or place whatsoever." On this article the defendant relies for his justification. And if it were competent to the judge on the trial to declare his opinion of the true intent and meaning of it, it must be competent for this court to decide whether his opinion was or was not legal: or the defendant can have no relief by his motion; unless the court are to decide, without enquiry or authority, that the opinion was against law. But I know of no action within the jurisdiction of a court, and regularly before it, in which it will not be the duty of the judges to decide all matters of law arising in it.

so far as the court is competent to decide on them, according to their own apprehension of the law. Otherwise they will have no jurisdiction of legal questions; or they must act as ministerial agents, deciding according to the will of others.

In considering this article, it appears to me, that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending the general court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature.

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office, without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the the nature, and in the execution, of the office: and I would define the article, as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office; without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

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He cannot be exercising the functions of his office as member of a body, unless the body be in existence. The house must be in session, to enable him to claim this privilege ; and it is in session, notwithstanding occasional adjournments, for short intervals for the convenience of its members. If a member therefore be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body, of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought therefore to be protected from civil or criminal prosecutions for every thing said or done by him, in the exercise of his functions, as a representative in committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege, when executing the duties of his office, in a convention of both houses, although the convention should be holden in the senate chamber.

To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. But he may have other compensation awarded to him by the house, who have power, as a necessary incident, to demand of any of its members a retraction, or apology, of or for any thing he has said, while discharging the duties of his office, either in the house, in committee, or in a convention of the two houses, on pain of expulsion. But if it is allowed that the remedy is inadequate, then a private benefit must submit to the publick good. The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions.

A more extensive construction of the privileges of the members secured by this article, I cannot give ; because it could not be supported by the language, or the manifest intent of the article. When a representative is not acting as a member of the house, he is not entitled to any privileges above his fellow citizens ; nor are the rights of the people affected, if he is placed on the same ground, on which his constituents

stand. He is secured in the liberty of travelling to the house, of attending his duties there, of exercising the functions of his office as a member, and of returning home. But so careful were the people in providing that the privileges, which they, for their own benefit, had secured to their representatives, should not unreasonably prejudice the rights of private citizens; that a member may be arrested upon execution in a civil suit, in cases where he could not be lawfully arrested on original, or *mesne* process. And that offences against law may be duly and seasonably punished, this privilege is not extended to arrests on criminal prosecutions, in any case where by law the member may be prosecuted as a criminal.

If this very liberal construction of the twenty-first article be just; if it be warranted by its language; if it be consonant to its manifest intent and design, the question before the court lies in a narrow compass.

Was *Coffin*, the defendant, in speaking the defamatory words, executing the duties of his office? Or, in other language, was he acting as a representative? If he was, he is entitled to the privilege he claims: If he was not, but was acting as a private citizen, as a private citizen he must answer.

Upon information given by the plaintiff to *Russell*, a member, he had moved a resolution providing for the choice of another notary for *Nantucket;* and on *Russell's* stating that his information was from a respectable person from that place, the resolution had passed; the house had proceeded to other business; and the subject matter of the resolution, or of the information, was not in fact before the house; although it is certain that any member might have moved to recind the resolution. *Russell*, his brother member, was in the passage way, conversing with several gentlemen: the defendant came to him, and enquired the name of *Russell's* informant, who, he had declared, was a respectable gentleman from *Nantucket*. Was this enquiry, thus made, the act of a representative, discharging his duty, or of a private citizen, to gratify his curiosity? It was the former, say the defendant's counsel. Whether it was or not, certainly it was innocent. But to pursue the evidence: the defendant was answered: whatever was his motive, he had received the in-

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formation. If upon it, he intended again to call up the resolution, he might have done it. But no motion, for that purpose, was ever made. He then utters to *Russell* the defamatory words. What part of his legislative duty was he now performing? It is said that he might apprehend that the plaintiff was a candidate for the office of notary; and that his motive might be to dissuade *Russell* from giving him his vote. But there is no evidence that the defendant supposed the plaintiff to be a candidate, and it is in evidence that the plaintiff was not a candidate. It is also apparent that the defendant believed that *Russell* was not ignorant of the indictment against the plaintiff, and of his acquittal. I cannot therefore assign to the defendant any other motive for his indiscreet language, but to correct *Russell* for giving to the plaintiff the appellation of a respectable gentlemam; and to justify the correction, by asserting that an honourable acquittal, by the verdict of a jury, is not evidence of innocence. It is not therefore possible for me to presume that the defendant, in using, thus publicly, the defamatory words, even contemplated that he was in the discharge of any official duty. This enquiry by the defendant, and his replies might have been made, for all the purposes intended by him, in *State-Street*, or in any other place, as well as in the representativs' chamber: and it is not easy for me to conceive that any language or conduct of a representative must be considered as official, merely because he chooses the representatives' chamber for the scene.

But it has been urged, that the privilege must extend to a representative giving information to a brother member, on any subject before the house; or which may be expected to come before the house; for the information may be necessary to enable the member informed to discharge his official duty with ability and propriety. Without remarking the essential distinction between a man's seeking information on subjects relating to his office, and his actual execution of its functions: and without observing the extreme difficulty of supposing that defamatory words, maliciously uttered, can ever be considered as useful information: I do clearly admit, that a representative will certainly be entitled to his privilege in all cases, where he shall give information in the discharge

of his official duty; although the manner may be irregular, and against the rules of the house. But when a representative pleads his privilege, to entitle himself to it, it must appear that some language or conduct of his, in the character of a representative, is the foundation of the prosecution, for in no other character can he claim the privilege.

But in actions for defamatory words against a member, he may in cases to which his privilege does not extend, defend himself, like any other citizen, by proving that the words were spoken for a justifiable purpose, not maliciously, nor with a design to defame the character of any man. And this defence will avail every man charged with slander, although it may be that the words uttered are not true. I do not therefore consider any citizen, who is a representative, answerable in a prosecution for defamation, where the words charged were uttered in the execution of his official duty although they were spoken maliciously; or where they were not uttered in the execution of his official duty, if they were not spoken maliciously with an intent to defame the character of any person. And I do consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege further than was intended by the people, or than is consistent with sound policy; and would render the representatives' chamber a sanctuary for calumny: an effect, which never has been, and, I confidently trust, never will be endured by any house of representatives of *Massachusetts*.

It has been said, that although the judge at the trial had no other information of the nature and extent of the defendants privileges, but what he derived from the constitution; yet that since the trial, on the first of March instant, the house passed a resolution declaratory of the privileges of its members, to which declaration we are obliged to conform in our judgments: because the house is to judge exclusively of its own privileges.

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That the house is to judge exclusively of its privileges, for certain intents and purposes, is very certain; but if it is to exclude courts of law from judging of the privileges of its members in every case, the consequences would be unfortunate to the members. If a member, in any action, pleads his privilege, he submits it to the judgment of the court; and, if it be allowed, it is by virtue of the judgment of the court. All therefore, which the court could do, upon such a hypothesis, would be to reject the plea, lest, in judging of it, it should invade the privileges of the house.

The resolution declares that words spoken by any member, within the walls of the house, relative to any subject under their consideration, either in their separate capacity, or in a convention of both branches of the legislature, whether the member speaking such words addresses himself in debate to the chair, or deliberates or advises with another member respecting such subject, are alone and exclusively cognizable by the house: and that for any other tribunal to take cognizance of words thus spoken would be a violation of the twenty-first article of the constitution. And the words relied on for the defendant are, "*whether the member speaking* " *such words addressed himself to the chair, or deliberates* " *or advises with another member respecting such subject.*"

As it is admitted by the defendant's counsel that this court is competent to construe the twenty-first article, in order to decide whether the facts in the case bring the defendant within it; so also it is admitted that the court is competent to construe this resolution for the same purpose. The resolution, judging from the face of it, does not appear to be an act of the house in any case of contempt on trial before it; but to be a general declaration of the privileges secured to the members by the twenty-first article of the constitution; because it is declared that an invasion of these privileges would be a violation of that article. I consider the house therefore as defining the constitutional privileges of its members, relating to words spoken by them. In this declaration, the words must be spoken on a subject before the house, and either addressed to the chair, or by one member to another by way of deliberation and advise on the same subject.

In either case the words must be spoken officially, although in the latter case they may be spoken in a disorderly and irregular manner. The house has not therefore claimed any privileges for its members, when prosecuted for slander, unless the words charged were spoken officially in the characacter of a representative. This inference is inevitable, unless it should be unreasonably concluded that one member could deliberate or advise with another member, on a subject before the house, having abandoned his official duty, and acting as a private citizen. Whether I do, or do not allow to the resolution, thus passed, the force of law; I am satisfied that it claims no privileges, but what are secured to the members by the constitution, of which, as far as it extends, it is in affirmance. The resolution does not therefore, in my opinion, aid the defendant; for it appears, from the facts in the case, that the defamatory words, charged on the defendant, were not spoken by him on a subject before the house, either in an address to the chair, or by way of deliberation or advice with another member.

It has been urged that a declaration of privileges made by the house, whether those privileges do, or do not belong to it, has the force of law, and is obligatory, in all cases, on the courts of justice. A declaration of that nature is not now before us; for I am satisfied that the house has all the privileges claimed by its resolution. Whenever a declaration shall be made by the house, claiming privileges not belonging to it in the opinion of the judges of a court of law, let the judges then decide the question. The merits of it must depend on a careful consideration of the constitution, with a due regard to the privileges and prerogatives of the house resulting from it. On this subject I give no opinion: but from the observations I have already made, it may not be improper to declare, that if it had appeared to me that the words charged on the defendant, had been officially spoken by him without the walls of the representatives' chamber, either in a convention of the two houses holden in the senate chamber, or in a committee, while executing the commission of the house then in session, as I am now advised, I would have allowed him his privilege, although by the res-

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olution produced, the house seem to confine its privileges to words spoken within the walls of the representatives' chamber.

But the danger of conflicting jurisdictions has been insisted on with much ability and eloquence, if we should support the present action. I am sensible that where a conflict of final jurisdictions exists in any state, there must be a defect in the laws of that state. In my opinion, this state is not liable to the opprobrium: for I do not conceive that final conflicting jurisdictions here are consistent either with our constitution or statutes.

To introduce examples from the *British* house of commons, cannot much illustrate the subject. The privileges of that house are not derived from any written constitution, but have been acquired by the successful struggles of centuries, directed either against the monarchy or an hereditary aristocracy. The exertions of the commons have generally been popular, because the people were supposed to reap the fruits of them. In this state we have a written constitution, formed by the people, in which they have defined, not only the powers, but the privileges of the house, either by express words, or by necessary implication. A struggle for privileges, in this state, would be a contest against the people, to wrest from them what they have not chosen to grant. And it may be added that the grant of privileges is a restraint on the rights of private citizens, which cannot be further restrained but by some constitutional law. These principles are perfectly consistent with the resolution of the house, which is not a claim of any further privileges not granted by the constitution; but a description of some, and only of some privileges there granted.

I consider the house of representatives, not only as an integral branch of the legislature, and as an essential part of the two houses in convention, but also as a court having final and exclusive cognizance of all matters within its jurisdiction, for the purposes for which it was vested with jurisdiction. It has jurisdiction of the election of its members; of the choice of its officers; of its rules of proceeding; and of all contempts against the house, either in its presence, or by violating the constitutional privileges of its *members*. When the house is proceeding as a court, it has, exclusive-

ly, authority to decide whether the matter before it be, or be not within its jurisdiction, without the legal controul of any other court. As to contempts, the house proceeds against the offender to punish the contempt. Courts of law proceed to punish offences against the state, and to redress private wrongs. The same act may be a contempt against the house, an offence against the state, and an injury to an individual: and in all these respects, proceedings may be had against the offender.

When the house decides in a question of election, it can conclusively decide on the right of voting claimed by any elector, so far as is necessary to settle the election. But an elector, illegally deprived of his right of voting, may demand redress for this wrong against the selectmen by a suit at law. This was decided in the cases of *Gardner* and of *Kilham* against *the selectmen of Salem*(6): where the only defence set up was that the plaintiffs had no right to vote. Upon this question the judgments of both courts, however rendered, could be executed without any interference. Let me illustrate the subject by supposing a case or two. A member is assaulted in the town, in which the house is in session, and is cruelly beaten, for words spoken in the house in the execution of his duty. The house may proceed against the assailant for a contempt: and cannot the member prosecute him at law for damages? And may not the grand jury indict him for a breach of the peace? And neither can the proceedings of a court of law controul the proceedings of the house, nor can the proceedings of the house controul the courts of law. The judgments of each court, whatever may be the result, can be executed without any interference. Suppose a publick officer indicted for extortion, and upon trial acquitted at law: cannot he afterwards be convicted by the senate on an impeachment? Both judgments may be executed without interference. The courts of law proceed to punish the offender, and he is acquitted. The power of the senate is censorial, and exercised to preserve purity in office. If it should be supposed that the senate cannot proceed after an acquittal at law, it should be remembered that, by the express provision of the constitution, courts of law may proceed after a conviction in senate; and in the pro-

(6) Vide 2 *Mass. Rep.* 236. 244.

ceedings at law the jury may acquit: and it could not have been intended to place the senate as subordinate to a court of law. The true design of that provision was a mere cautionary declaration that the proceedings in the senate were not to *punish* offenders against the state, but for a different end. And I would add that, in the present case, if the house, of which the defendant was a member, had proceeded against the plaintiff for a contempt in suing this action; whatever had been the result of its proceedings, this court could not have interfered, or granted any relief, until the sentence had been performed. And as this judgment could not have affected those proceedings, so neither could those proceedings have controuled the authority of this court. The two courts are independent and have each exclusive cognizance of the matters within its jurisdiction: and although the transaction animadverted on may be the same, yet the proceedings are for different purposes, and the judgments of both courts may be executed without any interference. There cannot therefore be any conflict of jurisdictions.

Extreme cases of the abuse of power, either in the house of representatives, or in this court, may be imagined; but they are not to be argued from, to influence legal decisions.

Since the argument of this cause, I have examined the subject with as much attention as I have been able to give to it, amidst all the business of the court pressing on us, with a strong disposition to guard the privileges of the house, and of its members, because their privileges are essential to the rights of the people, and ought to be supported, by every good citizen, according to their true limits.

From this examination I am satisfied that, whatever may be our decision of the question, it is within our jurisdiction thus brought before us; and that no breach of the privileges of the house, or a conflict with its jurisdiction can result from our determination.

I am convinced, after much consideration, that the facts presented by the case do not entitle the defendant to the privilege, which he claims; and that, for this cause, the verdict ought not to be set aside.

Under this impression, to give a different opinion would be a desertion of a solemn duty, and a gross prevarication with my own conscience.

In this opinion of the *chief justice*, the other judges, *viz. Sedgwick, Sewall, Thatcher* and *Parker* severally declared their full and entire concurrence.

The motion for a new trial, on the ground that the jury had given excessive damages, was afterwards argued by the same counsel.

Dexter observed that the true principle which must govern in every case of this kind was, that the damages ought to be in exact proportion to the injury sustained. In actions for a breach of contract, or for a tort committed on property, it is easy to apply this principle, but in actions for a mere personal tort, the great difficulty was to form a precise estimate of the injury received. It must be greater or less, according to the character and circumstances of the parties, the manner of the act or words complained of, the degree of malice shewn by the wrong doer, the amount of the suffering of the other party, and very many other circumstances, which it is not necessary to recite.

In the case now before the court no circumstances appear which should occasion the award of very extravagant damages. There was no evidence that either of the parties was possessed of very great wealth. The only witness sworn at the trial testified that the plaintiff was a very respectable man. There is no disposition on the part of the counsel for the defendant to derogate from that character. The plaintiff is however but a private citizen; so he has not lost any office of rank or profit, nor been put in hazard of losing such an office. The defendant is the representative of his town in the legislature of the commonwealth. This is the amount of what appears respecting the character and circumstances of the parties.

If the words charged had been publickly spoken and addressed to the house, the damage to the plaintiff would have been greater in proportion to the number of the persons, who should hear them: and it may be added that the defendant's official standing, as a member of the house, would

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have given weight as well as credit and currency to the slander. Yet in such a case, it is agreed that the plaintiff could have obtained no pecuniary satisfaction whatever for the injury he might have sustained.

The sole ground on which an action of slander for charging the party with a crime can be maintained, though no actual damage be sustained, is that the law presumes damage from the danger that may arise of being prosecuted for the offence: the present case is one, in which the general principle would not entitle the plaintiff to any damages: for he cannot be put in danger of prosecution after an acquittal.

From the fact of the acquittal, it may likewise be strongly argued, that the real damage to the plaintiff must be very inconsiderable; inasmuch as he had it in his power at any time to prove his innocence, by the record of his trial, which he might always have in his pocket or publish to the world, if he saw fit.*

From these considerations the damages assessed by the jury appear enormous and excessive, and it is believed that no case can be shewn where so high a sum was given without the allegation or proof of any actual or special damage whatever.

Whitman, in support of the verdict, said that the conclusions he should draw from his brother *Dexter's* premises were widely different from those *he* had suggested.

If these words had been spoken in debate, they might have been attributed to the warmth, and even intemperance, not unfrequently exhibited in publick discussions. In such case malice would be less presumable in the speaker, and the impression on the minds of the hearers would be less forcible and permanent. By uttering the slander in the artful manner, which the case exhibits, the defendant not only shewed more malice than by an open charge unguardedly made in

* Mr. *Dexter* observed, in the course of his argument upon this question, that he was of counsel for the prosecution upon the indictment against the present plaintiff, to which the words spoken alluded; and he said that he was himself perfectly satisfied of the correctness of the verdict of acquittal, there having been, in his opinion, very little evidence, to throw a suspicion of guilt upon the object of the prosecution. And this Mr. *Dexter* believed to be the unanimous sentiment of all fair and discerning men, who heard the trial.

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an animated contest, but the mischief and damage to the subject of the slander were also greatly enhanced.

The counsel for the defendant has said that the plaintiff's acquittal was notorious, and if it was not, he might publish it, and by this means prevent any injurious impression on the publick mind from the words spoken. That acquittal *has* been published, and it ought to have been a shield to the plaintiff, and have protected him against such malignant insinuations. If a judicial declaration of innocence is not sufficient to protect that innocence from an imputation of guilt, an acquittal in a court of law after a full discussion will lose much of the value which has been attached to it.

In the case of *Bartlett* vs. *Willis*, in *Cumberland*, which was for a libel, the jury gave 1500 dollars damage. The defendant there pleaded the truth of the words in justification: and although such a justification, if it wholly fail in the proof, may be considered rather as an aggravation of the injury; yet it often happens, and therefore may well be presumed to have happened in that case, that the defendant in support of his justification approaches very near to the legal evidence of the truth of his plea, which, though not sufficient to give him a verdict, would naturally and properly have an influence with the jury in lessening the damages.

In the case at bar the direction of the judge to the jury as to the damages was unexceptionable: he declared it to be a subject entirely and exclusively within their province, and he would say nothing which might have a tendency to influence their verdict, except to lay down a general rule in cases of this kind, that the degree of malice was the proper measure of the damages. The law and the fact united were left to the decision of the jury; and the court will respect the rights of juries as well as their own. They will not lightly set aside a verdict given upon full evidence and solemn argument, where no surprise or corruption is suggested.

The parties in this action, their characters and circumstances were well known to the jury who, in contemplation of law, are their neighbours. If they have estimated those characters and circumstances, and considered the degree of malice shewn in the case, is it for the court to say they

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have overvalued the plaintiff's character, or judged wrongly of the malice exhibited? It was not improper for the jury to consider the very great expense the plaintiff had been put to in the prosecution of this action, to which he was impelled by every sentiment of honour. And although the maintenance of a fair and irreproachable character among his fellow-citizens was his sole motive in instituting the suit, yet a pecuniary satisfaction is all that by our law he can obtain, and upon the amount of this will his character in no small degree depend.

The true principle in cases of this sort was laid down by lord *Mansfield*, in the case of *Gilbert* vs. *Burtenshaw*(7). That was, like the present, a motion to set aside a verdict and grant a new trial on the ground of excessive damages in an action for a malicious prosecution for perjury, and for slander. Lord *Mansfield* says he should be sorry to say, that in cases of personal torts, no new trials should ever be granted for damages which manifestly shew the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed; nor unless it appears that the damages are flagrantly outrageous and extravagant.

The attorney general, Bidwell, in reply, thought that the circumstances, under which the words in this case were spoken, indicated a much less degree of malice in the defendant, than if they had been spoken in publick debate. They were not even addressed to an enemy of the plaintiff, who might have derived a malicious satisfaction in propagating the slander: the communication was made to the plaintiff's friend, who had without doubt been acquainted with all the circumstances of the indictment and trial, which the defendant is supposed to have had in his mind when he spoke the words: to one who, the defendant had every reason to believe, would have no disposition to give currency to the insinuation. The case shews no repetition of the slander, from which a resolution to persist in it, beyond the mere occasion of uttering it, might be inferred.

The case of *Bartlett* vs. *Willis*, was for eighteen or twenty libellous publications concerning the plaintiff, in a news-

(7) *Cowper*, 230.

paper, edited by the defendant. Some of them charged Mr. *Bartlett* with gross misconduct in his office, as a senator of the commonwealth. Neither in the circumstances of the case, nor in the character of the parties, therefore, can any inference be drawn from that case in support of the present verdict. It is well known too, notwithstanding the circumstances of aggravation in that action, that the amount of the damages awarded was a matter of extreme surprise, wherever it was known.

It is very true that, in presumption of law, the jurors are summoned from among the neighbours of the parties. But if any stress is laid on this point in the present argument, the court will take notice, that when this cause was submitted, at the court below, to a jury, who were in fact all inhabitants of *Nantucket*, and the real neighbours of the parties, to whom not only their characters and situation were perfectly known, but all the circumstances of the transaction, which were alluded to by the defendant, were familiar, the plaintiff recovered but fifteen dollars for this very injury, and upon the same evidence upon which a jury of this county have awarded the enormous sum of two thousand five hundred dollars.

Some days after this last argument the following opinion of the court was delivered by

PARSONS, C. J. The court having given their opinion that the verdict ought not to be set aside for the misdirection of the judge, the defendant now moves for a new trial, because the damages found by the jury are excessive.

That a verdict may be set aside for excessive damages, there can be no doubt; and it may be done in two cases: one case is where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict. In this case are included actions on contracts, or for torts done to property, the value of which may be ascertained by evidence. The other case includes actions for personal injuries, where no rules are prescibed by law for ascertaining the damages, but from the exorbitancy of them the court must conclude that the jury acted from passion, partiality, or corruption, causes which naturally produce error or injustice. But to enable the court to draw this conclusion, it is not enough, that in

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their opinion the damages are too high, or that much less damages would have been a sufficient satisfaction to the plaintiff; for the law has not intrusted the court with a discretion to estimate the damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing all the circumstances of the case, and considering the state, degree, quality, trade or profession, as well of the party injured, as of him who did the injury. Judges therefore should be very cautious how they overthrow verdicts, given by twelve men on their oaths, on the ground of excessive damages.

But as excessive damages may be a good cause for setting aside a verdict in an action for a personal injury, it may be proper to consider when damages are, for this purpose, to be adjudged by the court to be excessive. In *Wilford* vs. *Berkley*(8), the principle stated is, that the magnitude of the damages must be such that the court can manifestly see that the jury have been outrageous in giving such damages, as greatly exceeded the injury. A verdict must be set aside for excessive damages, if they are such as are unreasonable and outrageous, and which all mankind might at first blush see to be unreasonable(9). And it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce the court to grant a new trial for excessive damages(10). In the case of *Boardman* vs. *Carrington & al*(11) it is observed by the court, that there is a great difference between cases, where damages may be seen, as in promises or trespass for goods, and where the damages are matters of opinion and speculation, and are ideal; that the judges are to advise and not to controul juries; and when a verdict is set aside for excessive damages, it must be in a case where the damages are monstrous and enormous indeed, and such as all mankind will be ready to exclaim against at first blush. It is admitted in the case of *Gilbert* vs. *Burtenshaw*, which was cited at the bar, that verdicts may be set aside for excessive damages, when

(8) 1 *Burr.* 609.
(9) *Leeman* vs. *Allen & al.* 2 *Wils.* 160.
(10) *Huckle* vs. *Money.* 2 *Wils.* 205.
(11) 2 *Wils.* 244.

their magnitude manifestly shews the jury to have been actuated by passion, partiality or prejudice. But it is observed that it is by no means to be done because the court may feel, that if they had been on the jury, they would have given less damages, or because they may think that the jury would have discharged their duty by giving a less sum. And that of all the cases delivered to a jury, none is more emphatically left to their sound discretion than an action of slander: and unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw a line.

The result of these cases seems clearly to settle the principles, which are to govern the court, in setting aside a verdict for excessive damages in an action for a personal injury. When the damages are so great, that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice, or corruption, the court may set aside the verdict, and send the cause to another jury for revision.

Let us now consider the evidence, so far as it can be collected from the record and the judge's report.

The words uttered imported a charge of an heinous crime, a felonious robbery of the *Nantucket* bank. They were not spoken privately, but in the chamber of the house of representatives, and in the hearing of some people there, for *Russell* was interrupted by the defendant, when conversing with several gentlemen. The defendant was in a respectable and honourable station, representing in the legislature the town of *Nantucket*. And there is no evidence of the condition, circumstances or profession of the plaintiff.

The defendant's counsel have argued that the damages are excessive on three grounds. That it appears from the record, that the jury at the common pleas in *Nantucket*, assessed the damages at fifteen dollars only: That the defendant did not wantonly seek occasion for uttering the slander, but that it was offered by the language the witness had used on a subject recently under the consideration of the house: And that it appears that the plaintiff, having been acquitted of the crime imputed to him, was not in danger of being prosecuted criminally in consequence of the defamation.

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The first argument cannot have any weight, because we have no knowledge of the evidence offered to the former jury, and can therefore form no opinion of the impression, which the injury, the plaintiff complained of, ought to have made on their minds. And if we could presume that they had the same evidence that was given to the last jury; yet it is an established rule of law, that the jury on the appeal are obliged to try the cause uninfluenced by any former verdict.

The circumstance relied on in the second argument does not appear to us to have much if any tendency to mitigate the damages. *Russell* had declared that his information was from *a respectable gentleman:* an epithet, when applied to the plaintiff, the defendant did not brook, but retorted the charge of felony.

The last circumstance relied on by the defendant's counsel certainly had a tendency, in one view of the subject, to mitigate the damages, for the reason assigned in the argument. But upon a consideration of all the circumstances, it is our opinion that its tendency was, upon the whole, to aggravate the damages. The plaintiff, having been accused of felony, had submitted his cause to his country, and a jury had acquitted him. This was all he could do in his own justification. If he is not now to be considered as an innocent man, he has no other remedy, no other hope. This publick declaration of his innocence before a competent and impartial tribunal he has a right to consider not only as a defence against punishment, but as a shield against calumny. But the defendant, as far as in him lay, would disarm him of his defence,and expose him helpless and unprotected to obloquy and disgrace. He cannot have another trial for the offence, and when he seeks, in a civil action, a compensation for the injury,he ought to receive a liberal and exemplary satisfaction.

There is no objection to the direction of the judge to the jury on the subject of damages; and there is no evidence that they had been tampered with, or were connected with either party, or were influenced by any bias or prejudice to either side. The cause was left to them under all the circumstances either party thought fit to lay before them; and they found a verdict for the plaintiff, assessing his damages at twenty-five hundred dollars.

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Before we can set aside this verdict, on account of these damages, we must infer from their magnitude, under all the circumstances of this case, that the jury acted intemperately, or were influenced by passion, prejudice or partiality. To make this inference, we must have satisfactory evidence that the damages are excessive(12); and in our opinion this evidence is not before us. The verdict therefore cannot be set aside.

Were we impressed with a belief that the damages were too great, and that a less sum would have been an adequate compensation to the plaintiff, yet whether our impression or the impression of the jury is the most correct, as judges we are not authorized to determine. The plaintiff's counsel has intimated that he did not wish for larger damages than the court should think reasonable, as the object of his cliant in the prosecution was to obtain justice for his character, and not to dispose of it for money. It is not the province of the court to advise either party; but as the jury have done ample justice to the plaintiff's character, we are satisfied that a liberal remission of a part of the damages could not in any manner operate to the plaintiff's dishonour.

Unless there be a remission of part of the damages, judgment must be entered according to the verdict.

(12) 2 *Wils.* 248.

JESSE PUTNAM AND AL.

versus

JOHN L. SULLIVAN AND AL.

In an action by an endorsee against an endorser of a promissory note, the plaintiff is not held to prove a demand on the promissor, if it appears that he had absconded before the note is payable.

Where a merchant intrusts his clerk with his blank endorsements, and one by false pretences obtains and uses them, such fraudulent use of them is not a forgery,—nor is it such a fraud as will discharge the endorser against the endorsee.

CASE by the endorsees against the endorsers of a promissory note, dated December 1, 1804, payable to the defendants or their order. The action was tried at the last November term before *Parker, J.* when a verdict was given for the plaintiffs for the amount of the note and interest, sub-

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ject to the opinion of the court whether upon the facts proved, and which were to be reported by the judge, the action could be maintained. If the court should be of that opinion judgment to be entered according to the verdict, with additional damages for interest to the time of the judgment: if the court should be of a different opinion, a new trial to be granted.

Those facts were in substance, that the note was payable in 90 days from the date *with grace*, that the plaintiffs were innocent endorsees, having received the note endorsed in blank, and paid a valuable consideration for the same. The hand-writing of the promiser and endorsers were admitted, the latter being the hand-writing of *W. B. Sullivan*, a partner of the house doing business under the firm of *Jno. L. Sullivan & Co.* The note being lodged in the *Boston* Bank for collection, notice was left at the lodgings of the promiser by the messenger of the bank, on the 23th of February, 1805, and on the 3d day of March following, the said *W. B. S.* one of the endorsers, was notified that the note was unpaid. It was also in evidence that the promiser had absconded before the note fell due, and that this fact was known to all the parties at the time.

One of the defendants being abroad in *Europe*, and the other, about the 1st of December, 1804, having occasion to make a journey from *Boston* to *Philadelphia*, intrusted with an apprentice or clerk of the house a number of papers on which one of the house had written the name of the firm in blank, some to be used as notes endorsed by the house, and others as notes in which the house were to be promisers. These papers were intrusted to a clerk of the defendants to be used when money was to be advanced on the sale of goods by the house on commission, or to renew the notes of the house when due at the banks. The clerk was directed to be careful of the blanks left with him, and not to use any for the advance of money on the sale of goods on commission without consulting a brother of the partners. He was further directed to deliver one of the blanks to the promiser upon the note sued in this action, to enable him to renew a note signed by him then in the bank, of which the house were endorsers, and for which he had requested a blank to be

left. The promiser called on the clerk for the blank endorsement left for him, and one was delivered to him: afterwards pretending that by some mistake it had become useless to him, and, feigning to burn in the clerk's presence the name of the firm endorsed, procured another blank, and by a similar pretension and contrivance he obtained a third and a fourth blank endorsement, the last of which was in fact used for the purpose, for which the house had directed a blank endorsement to be given him. The promiser had used one of the prior blank endorsements for making the note sued in this action; which had been negociated, with the endorsement remaining in blank, to the plaintiffs.

The cause was argued upon these facts by *the solicitor general*, *Davis*, and *C. Davis* for the plaintiffs, and by *Dexter* and *Sullivan* for the defendants.

Sullivan said the defence relied on rested on *two grounds*, the *first* of which was, that the note, being payable in ninety days *with grace*, was not due until the days of grace were expired, and that the demand upon the promiser, being made before the time of payment, availed nothing.

Upon this point he was prevented from arguing by the court, who observed to him that it had been fully argued in the case of *Jones & al.* vs. *Fales* the present term, and he was directed to confine his observations to

The *second* point which he made for the defendants, which was that the names of the defendants being obtained by fraud, without the knowledge or consent of either of them, and without any consideration paid, no right of action could arise out of the transaction against the defendants.

All the cases found in the books of bills held good against the acceptor, though attended with fraud, relate to bills originally good, but coming through a fraudulent channel to the holder: and the reason given is, that the acceptor is in all events bound to pay it to some one. But in the present case the note originated in fraud, and was never made or intended for the benefit of the promiser. The defence as to this point rests on the same ground as that in the case of *Mead* vs. *Young*(1), where it was held to be competent to the de-

(1) 4 *Term R.* 28. See also *Master & al.* vs. *Miller*, *ibid.* 320.

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fendant, who had accepted a bill, to give evidence that the person, who endorsed it to the plaintiff, was not the real payee, though he were of the same name.

But we contend further that this was an actual forgery, which is said (2) not so much to consist in the counterfeiting a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that on the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and justice it ought not to have. Thus where one finding another's name at the botom of a letter, at a considerable distance from the other writing, caused the letter to be cut off, and a general release to be written above the name, and then took off the seal and fixed it under the release, it was held to be forgery (3).

C. Davis observed that he held it unnecessary to make any observations as to the first point made in the defence. He would just notice however that, whether the demand was made on the maker of the note on the proper day or not, was very immaterial, as before the note came to maturity he had absconded, and as no benefit could have accrued to the defendants from a mere idle ceremony, so no damage had arisen or could arise from its omission.

Upon the second point he contended that it was not competent to the defendants to impeach this note in the hands of innocent endorsees, however the transaction may have been between the maker of the note and the defendants.

If this note had been stolen by the promiser, and had come duly into the hands of innocent endorsees for a valuable consideration, it would have been good against the defendants (4).

Where one of two innocent parties must suffer, he who gives the confidence, not he who believes the false affirmation, must suffer. It was exclusively the act of the defendants, or rather their gross negligence, which enabled the promiser to commit the fraud in this case.

(2) 2 *Bac. Abr. Forgery*, A.
(3) 3 *Inst.* 171.
(4) *Miller* vs. *Race*. 1 *Burr.* 452.

The solicitor general insisted that in this case nothing more was disclosed than merely a breach of confidence. The clerk of the defendants was their agent, transacted all their business in their absence, received this paper of them for the express purpose that it should be delivered to the promiser, and he delivered it accordingly. All this shews a transaction very distinct from forgery. The case of *Mead* vs. *Young* was wholly different from the case at bar: and in that of *Master & al.* vs. *Miller*, there was the alteration of a paper, a complete technical forgery. In the case before the court, it cannot be pretended that the promiser could be indicted for the conduct here disclosed.

This note was carried into the market endorsed in blank, and it stands on the same footing as a note payable to bearer, or a bank note, which are transferable by delivery only. Possession carries with it the property(5). And in such case the transfer may be made by any person who, by any means, whether accident, fraud or even robbery, has obtained the possession; and any holder having given a valuable consideration, without knowledge of the accident or theft may recover against the drawer, acceptor or endorser in blank(6).

The case of *Russell* vs. *Langstaffe*(7), was in its prominent facts extremely like the case at bar. The defendant there had endorsed, for one *Galley*, his name on five blank copperplate checks made in the form of promissory notes in blank, *i. e.* without any sum, date or time of payment being mentioned in the body of the notes. *Galley* afterwards filled the blanks as he chose, and the plaintiff discounted them. The defendant at the trial objected that these notes were not, at the time of the endorsement, promissory notes, and that no subsequent act of *Galley*, could alter the original nature or operation of the defendant's signature, which, when it was written, was a mere nullity. The defendant obtained a verdict; and upon a motion for a new trial, *the attorney general*, *Lee*, one of his counsel gave up the point, relying

(5) 1 *Salk.* 126.—2 *Show.* 235.—3 *Burr.* 1516. 1 *W. Black.* S. C.

(6) *Kyd*, 102. cites *Miller* vs. *Race.* 1 *Burr.* 452. and *Peacock* vs. *Rhodes & al. Doug.* 632.

(7) *Doug.* 514.

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on another respecting the notice to the endorser. Lord *Mansfield*, delivering the opinion of the court, said, "The endorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, "*Trust* Galley *to any amount, and I will be his security.* It does not lie in his mouth to say, the endorsements were not regular." A new trial was granted, but the reporter adds that the defendant submitted without going to a second trial.

In the case before the court, there was extreme negligence on the part of the defendants. Suppose this clerk had knavishly issued the whole of the blanks left in his keeping for any sums his fancy or his avarice might have suggested, and sent them to market, who ought in such a case to be the sufferers? Certainly they who, by a misplaced confidence, had enabled the party to hold out false colours to the world: and not the honest and unsuspecting purchaser, who had no means of detecting the fraud. In the case of *Lickbarrow* vs. *Mason*(8), *Ashurst, J.* says, "We may lay it down as a "broad principle, that, whenever one of two innocent per- "sons must suffer by the acts of the third, he who has ena- "bled such third person to occasion the loss, must sus- "tain it."

Dexter, in closing for the defendants, said he was disposed to controvert very little of what had been urged for the plaintiffs. It is agreed that a note originally genuine and made payable to bearer, or if to order, endorsed in blank, and lost or stolen, if it come into the hands of an innocent holder, shall be good against promiser or endorser. This amounts to nothing more than that a person, who has promised to pay a sum certain to the bearer, shall be holden.

But yielding this principle is not conceding that one is bound to fulfil a supposed and ficticious duty, which he not only never undertook to do, but which he in truth never heard of. Here the defendants never did the act described in the declaration; they never made the promise alleged; never endorsed the note declared on. It is true the signature is genuine, but they never consented to the use made of it. They authorized the use of that signature for a specifick note assuring a particular sum and for no other purpose.

(8) 2 *Term R.* 70.

If such a note had been written as they had authorized, they would virtually have been endorsers of such a note, though written afterwards. But when a contract wholly different was fraudulently and falsely written on that paper, they say, and they are well grounded in saying, that they never endorsed that contract. The only reason why an endorser of a blank paper is held, is that the law presumes his consent to the contract afterwards written. But the facts negative such a presumption in the present case.

But we consider this a forgery, for which the promiser may be indicted. Forgery is the fraudulent making or alteration of a writing, with the intent to prejudice another man's right. No misappropriation of a writing already made, amounts to more than a breach of trust, but the alteration of a contract made does. The contract made by the defendants, when they put their names on this paper, was that they would be responsible for a certain given sum. A contract of a different kind was written on the paper, with an intent to prejudice them. It is not possible to distinguish this transaction, as to its legal or moral guilt from the case in 3 *Inst.* of one misusing the signature to a letter. If the writing super-added to the signature, be in conformity to the intent of the party, whose signature it is, then it cannot be said to be done to the predjudice of another's right: but if contrary to such intent, it comes within the legal description of forgery.

Suppose the defendants to have endorsed a note of 5000 dollars, and it should be afterwards altered by the promiser, before he uses it, to a note of 10,000 dollars, this would be forgery beyond all question. What constitutes the difference between such a transaction, and that disclosed in the case at bar? The note in this case was either fraudulently made to the prejudice of the defendants, or if it be supposed made previously to their endorsement, it can be only supposed made as they intended it to be made, and then it was fraudulently altered with the intent to prejudice them.

It was said that the defendants were guilty of gross negligence, and that therefore they must suffer rather than the plaintiffs, to whom nothing is imputable. But the defendants

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are not chargeable with negligence in any legal sense. It is true they placed a great confidence in their clerk, and, from long experience of his fidelity, it is presumable they thought him entitled to it. There are many cases, where a person is the cause of a wrong act, or furnishes the opportunity for committing it, and yet is not chargeable in law or morals with the consequences: such for instance as the case of subscribing one's name to a letter at such a distance from the writing as to give room for the fraudulent writing of a promise or release over the name. The defendants in this case placed but a common confidence in their clerk, and if he, without their assent, and beyond their intention, made an unjustifiable use of that confidence, the defendants are still as innocent as the innocent third person. If the clerk had, as the *solicitor general* put a possible case, issued all the papers left with him for his own gain, he would certainly be justified in saying that the defendants had not used due diligence, and that they ought, on every principle to be the sufferers. But it is not the negligence or misconduct of the clerk of which the defendants complain, or of which they wish to avail themselves in their defence. It was the misuse of a paper intrusted to the promiser, then in good standing, and which was delivered to him in a customary manner, and for a specific purpose. No other discretion in him was confided in, than that he would write a particular specific contract on the paper delivered to him. Of this misconduct, this gross fraud on his part, the plaintiffs wish to avail themselves.

Unless it appears that this was the individual paper delivered by the defendants to their clerk, to be handed to the promiser, he delivered it without their authority, and he was not their agent.

If this was not a legal and technical forgery, yet the defendants are not chargeable in this action. The note in this case was never obtained from them. It was never made nor endorsed by them. It was not received by the plaintiffs either from the maker or the endorsers. There never was a moment when the defendants consented to become sureties for the promiser on this note. There could then be

no contract on their part: and the principle relied on by the plaintiffs respecting a note originally good and valid, coming by wrong into the possession of an innocent third person for a valuable consideration, is not applicable to the case.

The opinion of the court was afterwards delivered as follows by

PARSONS, C. J. The *first* objection made by the defendants is founded on a want of a demand of payment on the promiser when the note was payable. As to this objection the facts are that on the first day of grace, which was the last day of February, notice was left at the lodgings of the promiser, that the note would be due on the last day of grace, with a request to pay it then: but it also appears that before that time it was known to the parties, that he had absconded, and, when the note was payable, he was not to be found. The condition, on which an endorser of a note is holden, is that the endorsee shall present the note to the promiser when due, and demand payment of it, if it can be done by using due diligence. Now it appears that when the note in this case was due, it could not be presented to the promiser for payment, and that there was no neglect in the endorsees. We are all therefore satisfied that the endorsers are holden on their endorsement in this case, notwithstanding there was no demand on the promiser.

The second objection is, that the defendants did not, in construction of law, endorse this note.

On the facts in this case we are to decide who shall suffer the loss of the money, the plaintiffs, who it is agreed are innocent endorsees, or the defendants.

It is objected that this note ought to be considered as a forgery of the names of the endorsers; because a note was afterwards written on the face of the paper by the promiser, not only without the direction or consent of the defendants, but against their express instruction; and therefore that it was a false and fraudulent alteration of a writing, to the prejudice of the endorsers.

This objection would have great weight, if when the endorsers put the name of the firm on the paper, they had

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not intended that something should afterwards be written, to which the name should apply as an endorsement: for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the endorsements for making promissory notes to charge the endorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these endorsements was delivered by the clerk, who had the custody of them, to the promiser, who by false pretences had obtained it, the fraudulent use of it would not be a forgery: because it was delivered with the intention that a note should be written on the face of the paper by the promiser, for the purpose of negotiating it as endorsed in blank by the house. And we must consider a delivery by the clerk, who was entrusted with a power of using these endorsements (although his discretion was confined) as a delivery by one of the house: whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any but to himself and to his principals.

It is further objected that, if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge the endorsers against an innocent endorsee. The counsel for the defendants agree that generally an endorsement obtained by fraud shall hold the endorsers according to the terms of it; but they make a distinction, between the cases, where the endorser through fraudulent pretences has been induced to endorse the note he is called on to pay, and where he never intended to endorse a note of that description, but a different note and for a different purpose.

Perhaps there may be cases, in which this distinction ought to prevail. As if a blind man had a note falsely and fraudulently read to him, and he endorsed it, supposing it to be the note read to him. But we are satisfied that an endorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here one of two innocent

parties must suffer. The endorsees confided in the signature of the defendants, and they could have no reason to suppose that it had been improperly obtained. The note was openly offered to the plaintiffs by a broker, and when they objected on account of the absence of both the endorsers, they were answered, on the information of the promiser, whose character then stood fair, that blank endorsements had been left with the clerk, and that the endorsers had before endorsed a number of notes for the same person, which had been negotiated by a broker. On the other hand, the loss has been occasioned by the misplaced confidence of the endorsers in a clerk too young or too inexperienced to guard against the arts of the promiser. It is to be regretted that the blank endorsements had not been deposited with the brother of the partners, who was directed to be consulted as to the use of them; for then no innocent person would have been a sufferer.

From a view of all the facts as they are presented to us, it is our opinion that the endorsers must be holden, and that judgment must be entered according to the verdict, with the additional interest agreed.

In forming this opinion we have been necessarily led to consider the effect of a different opinion on the commercial part of the community. How far it is common for merchants to intrust their clerks with blank signatures or endorsements is not known. But when merchants are in the habit of endorsing for each other at the banks, it is very common to put their names on blank paper, and deliver them to the party to be accommodated, for the express purpose of obtaining a renewal of certain notes, when they become due. And if the party having these signatures should employ them as names to other negotiable securities not contemplated, and the signatures should for that reason be void, much injury might result to innocent endorsees, or the bank discounts would be greatly embarrassed.

JOSEPH TAYLOR *versus* JESSE SUMNER AND AL.

If an insurance be effected against the perils arising from a blockade, supposed by the parties to exist in a foreign port, and in fact no blockade existed at the time, or while the ship remained at such foreign port, the insurance is void, and the premium shall be returned.

THIS was an action of the case upon two promissory notes made by the defendants and payable to the plaintiff, the first of which was dated May 26th, 1804, for 214 dollars and 15 cents, payable in six months from the date, and the second dated September 15th, 1804, for 1051 dollars 85 cents, payable on the 26th of November following.

Upon *non assumpsit* pleaded, the action was tried before *Parker, J.* at the last November term. Upon the trial it was admitted that these notes were given for the premium of insurance on a policy effected in the office of the plaintiff, an insurance broker, dated May 26th, 1804, whereby the defendants caused themselves to be insured in the sum of 3045 dollars on the schooner *Mary and Eliza* and appurtenances, at and from *Boston* to *Surrinam*, or port or ports in the *West-Indies* (*Gaudaloupe* and *Hispaniola* excepted,) and at and from thence to her port of discharge in the *United States*, at seven per cent. for which the note first described was given, and which was not contested at the trial.

When the defendants heard of the arrival of the schooner at *Martinico*, they supposed that island to be blockaded by the *British*, and upon that belief applied to the same underwriters, to insure them against the increased risk on account of that blockade. The underwriters, upon the same belief, agreed to take the risk, as appears by the following *memorandum* endorsed on the policy and signed by the underwriters, *viz.* "Boston, 3d *Sept.* 1804. *As the schooner* "Mary and Eliza *has got into* Martinico, *we the subscri-* "*bers in consideration of an additional premium of twen-* "*ty-six and one third per cent. agree to take the risk of* "*the same at and from thence to her port of discharge in* "*the* United States, *without prejudice to this policy.*" For this additional premium the second described note was given. The policy was in the usual printed form, which provides that any prior policy shall first operate, and the latter shall be void when the interest is fully covered by the former.

At the trial the defendants denied that *Martinico* was in fact blockaded at the time the vessel arrived there, or when she sailed from thence; so that the risk contemplated, for which the additional premium had been given, was never incurred by the underwriters.

The judge directed the jury, that if they were satisfied from the evidence that the note in the second count was given for the premium on the risk supposed to exist in consequence of a blockade, and that in fact no blockade did exist; as all the other risks were covered by the policy, for the premium of which the first note was given, they ought to find a verdict for the plaintiff as to the first described note, and for the defendants as to the second, and they found accordingly.

The plaintiff moved for a new trial for the misdirection of the judge, and that motion was argued at this term by *Selfridge* for the plaintiff, and *Amory* for the defendants.

Selfridge. If the vessel was known to be in *Martinico*, and both parties believed that island to be blockaded, although such belief was groundless, yet it formed a sufficient and good consideration. Egress from a blockaded place is as much a breach of the blockade as ingress, and a blockade might have commenced after this vessel was in port, and the underwriters would have been held to such extra risk.

This is within the reason of the decision in the case of *Boehm* vs. *Bell*(1), cited by *Marshall* (page 554). The doctrine drawn from that decision as laid down by *Marshall* is, that if the insured have a contingent insurable interest in the thing insured at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured.

If, under any circumstances, the insurer might, at any time, have been called upon to pay the whole sum insured, the premium is earned, and he shall not be obliged to return any part of it(2).

The verdict negatives the actual existence of a blockade, but it does not, nor could it negative the possibility of one,

(1) 8 *Term R.* 154.
(2) *Marshall*, 554.

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and this was a sufficient consideration, this was a risk, against which the defendants wished to be protected, and the underwriters, for an agreed premium assumed it upon themselves. It is quite immaterial how small or remote the contingency, or how exorbitant the premium demanded and given might be. If the risk or any part of it has been run, there can be no return of the premium.

If the parties, at the time of effecting a policy, believe property to exist, the contract is good and valid, although it was in fact lost and gone before the contract was made. So where a vessel has actually completed her voyage before the policy is made, the premium is not to be returned, if the fact was unknown. The present case is stronger than either of these, for here was a possible risk, though confessedly a remote one, and the underwriters having taken it, are well entitled to their premium.

The chief justice observed, that it was a question of great importance, whether an insurance against a blockade was a legal contract, inasmuch as a blockade derives its force from the law of nations, which constitutes a branch of the municipal law of every state.

Amory said he had always considered a blockade to be merely a municipal regulation, and to derive its whole legal authority from the law of the state or kingdom enforcing it, which is binding not only on the natural subjects of such state or kingdom, but on all others while within its power or jurisdiction. He was not however prepared to argue the point, and would only observe that if it was illegal to insure against a blockade, then this policy was void, and the premium could not be claimed.

The general principle will not be contradicted that where no consideration exists for a contract, such contract is void. Here the supposed consideration was the existence of a blockade. It turns out that no blockade in fact existed, as was supposed. Words cannot be invented to shew more plainly that there was no consideration. The first policy covered every risk except this imaginary one. The memorandum contemplates an existing blockade, not the possibility that one might exist. The premium being given for a risk never run, the assured is entitled to a return of it. If

the underwriters retain it, they will in fact receive two premiums for one risk: in other words this amounts to a double insurance.

This is very unlike the cases put of a policy on property actually lost, or on a voyage actually completed at the time of making the insurance. In both the cases the underwriters actually incur a risk, which they cannot, consistently with truth, and the common sense of the thing, be said to have done here by this memorandum, which is predicated on the supposition that the vessel had then actually broken the blockade by having *got into* the blockaded port.

The opinion of the court was afterwards delivered by

PARSONS, C. J. The question referred to our decision in this case is, whether the direction of the judge to the jury was right.

As the schooner, by the first policy, was insured to, at, and from *Martinico* against all the usual risks, the assurers were already answerable for all those risks, in which the risks resulting from a blockade are not to be included. The words of the *memorandum* are also general, and by it no property is covered, and no risks are insured against, but those which are contained in the policy. On this view of the subject, without considering the motives or grounds of making the *memorandum*, the insurance thereby effected must be considered as a double insurance, and the premium cannot be recovered.

But the plaintiff contends that the representation of the motives and grounds of making the memorandum is to be considered as part of it; and taking them in conjunction, it appears that the underwriters took upon them a new risk, for which they were not answerable by the policy: that by the *memorandum* they were made liable not only for all risks arising from the supposed *existing* blockade of *Martinico*, but also from any blockade that might afterwards be formed of that island.

If the plaintiff's construction of the representation and *memorandum* be right, the conclusion seems to be reasonable. His case will then be within the rule, which entitles assurers to all premiums for assuming risks, for which they may, by any possibility, be answerable.

But we are satisfied that the plaintiff is mistaken in his construction. To us it appears from the representation, on which

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the memorandum was made, that the parties contemplated no other risks, but those arising from an existing blockade, and that the memorandum can be extended to no other risks: therefore any loss happening from any future blockade could not be a charge on the assurers.

If we are right in this opinion, the *memorandum* does not extend to any risks, except those which might arise from a blockade, which the jury have found never existed. There could not therefore be any possible loss incurred by the underwriters in consequence of making the *memorandum*. And as the *memorandum* was made through innocent error, and without any fraud, it is void, and the premium, stipulated as the consideration for making it, cannot be recovered. It is therefore our opinion that the direction of the judge was right, and that the verdict must stand.

Let judgment be entered according to the verdict.

JOSIAH MARSHALL *versus* JOSEPH HOSMER.

If a creditor endorses on an original writ a direction to the officer to attach sufficient estate of the debtor, or hold him to bail, it seems that the officer has an election to execute the writ in either way.

But if the creditor, notwithstanding such direction endorsed, on delivering the writ gives verbal orders to the officer to attach certain specified property, he is bound to conform to such orders.

THIS is the same action, in which the plea in abatement was overruled, and a *respondeas ouster* awarded [*Vid. ante vol.* 3, *page* 23,] and was brought against the defendant, sheriff of the county of *Middlesex*, for the default of *Zaccheus Shed*, his deputy, in not attaching personal property of one *Ephraim Kidder* upon a suit brought by the plaintiff against said *Kidder* to the court of common pleas in the county of *Suffolk*.

At the trial of this action before *Parker, J.* at the last November term, it was proved that the plaintiff in person, on the 28th of June, 1804, delivered the writ against *Kidder* to *Shed* in *Billerica*, where *Kidder* lived, and directed him to go to the store kept by *Kidder*, and attach the goods therein,

The creditor is not bound to go with the officer making the attachment; but if he direct goods to be attached not in possession of the debtor, or about which there is a dispute, he must give the officer an indemnity.

A sheriff is answerable *civiliter* for the malfeasance or nonfeasance of his deputy in the duties enjoined on him by law, but not for the breach of a contract, made with a plaintiff, to do what by law he is not obliged to do.

and also his furniture in his dwelling house. *Shed* wished the creditor to go with him, and shew him the goods, but he replied that he was in a hurry to return to *Boston*, and that it was not necessary for him to go with the officer. *Shed* then took the writ, without making any other observation. He made service of it by arresting *Kidder* and taking bail. Upon the execution issuing on the judgment in that suit, which was also delivered to *Shed*, he committed *Kidder* to prison, from which he was afterwards liberated under the provisions of the "act for the relief of poor prisoners who are committed by execution for debt," having taken the oath therein prescribed.

It also appeared that upon a writ issued against *Kidder* in favour of another creditor on the 7th of July, 1804, and served on the 9th day of that month, personal property, more than sufficient to satisfy *Marshall's* demand, was attached, and afterwards levied upon and sold to satisfy the execution of said other creditor.

It further appeared in evidence that at the time the plaintiff delivered his writ to *Shed*, and for several days after, *Kidder* was doing business openly in his store, and that his house was free of access.

The defendant's counsel contended 1st. that an officer is not bound by law to attach property, unless the creditor will shew it to him. On this point the judge directed the jury that, whether the counsel was correct or not, if they believed from the evidence that the officer in this case waived his claim on *Marshall* to go with him, and undertook to serve the writ according to his directions, he was bound.

2. There being a direction on the back of the writ to attach sufficient estate or hold to bail, the officer had his election, whether to attach property or to arrest the body. The judge directed the jury that the construction of the order endorsed on the writ was, to attach property if it could be found; otherwise to hold to bail: and that if this were not the true construction, the verbal direction to the officer made it his duty to search for property.

3. It was contended that the sheriff was not by law accountable for the default of his deputy as stated in the declaration; the duty of the deputy in this case resulting from a per-

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sonal engagement, and not from official obligation. On this point, the judge directed in favour of the plaintiff, for whom the jury returned their verdict, and the several points of law were reserved to be argued on a motion for a new trial.

And now at this term *Bigelow*, of counsel for the defendant in support of the motion for a new trial, insisted that the officer was not liable to an action for not attaching property in the service of a writ, unless the creditor would point out to him the specific goods he would have so attached. If this position was not true, the case of an officer was peculiarly hard. He had no means of ascertaining the debtor's property in goods. They might belong to a third person, and by attaching them the officer would expose himself to an action, in which he could not demand aid or indemnity from the creditor who had employed him. It is true that in this case it was argued that the officer had waived his claim to the personal attendance of the creditor by receiving the writ, and undertaking to serve it without such attendance, but as this conduct of the officer was denied by the defendant's counsel at the trial to amount to a waiver, and as the jury might be of opinion that it did not, it was the duty of the judge to have declared to them the law, in case they should find the officer had not so waived his claim.

The judge's construction of the order endorsed on the writ is apprehended to be an unsound one. The direction to attach sufficient property or hold to bail, can have no other fair interpretation than a direction to hold to bail or attach sufficient property. In either case the officer has an option left him, and if he obeys either alternative, he completely fulfils the command.

The plaintiff's claim on the sheriff in this action seems to be grounded altogether on a pretended personal stipulation of his deputy to do what, it is believed, he was not bound by law to do, *viz.* to attach specific articles not pointed out to him by the creditor. But for such stipulations the present defendant is not answerable. The promise in this case, if the deputy made it, was aside from his official duty, for the correct performance of which only is his principal responsible. The plaintiff would make him chargeable for the breach of a special promise of his deputy, which he made without any authority from the defendant, if he made it at all.

Thurston, for the plaintiff, was stopped by the court.

The opinion of the court was afterwards delivered by

PARSONS, C. J. From the facts reported, it is manifest that the plaintiff has lost his debt through the conduct of the deputy sheriff, and the first point for the decision of the court is whether, from the circumstances of the case, the deputy was in fault. [Here his honour recapitulated the facts as before reported.]

It is urged for the deputy, that, in consequence of the special endorsement on the writ, he might attach either the body or estate. And we are inclined to allow this objection, if no verbal directions had been given him. When an original writ is delivered to the sheriff, with this special direction, perhaps he is not holden to look up estate, and to attach it as belonging to the debtor, without any indemnity: and if he takes the body he conforms to the direction. But in this case he was verbally directed to attach certain chattels, describing their nature and situation: and I am satisfied that he was bound to obey this verbal direction, if he lawfully could.

It is further said that the plaintiff did not go with him to make the attachment. I know of no law directing the presence of the creditor with the officer to oblige him to make an attachment. The creditor ought, if required, to designate the chattels to be attached; and also, if they are not in the possession of the debtor, or if there be a dispute concerning the property, to give the officer an indemnity for making the attachment. In this case, the chattels to be attached were sufficiently designated, and there was no request of an indemnity. And if the officer could have insisted on the plaintiff's going with him, he waived his right, by taking the writ with the verbal direction to make the attachment, after the plaintiff had declined going with him, without making any objection to conforming to the direction.

Another question made is, whether, if the deputy was in fault, the sheriff is answerable for the default. The sheriff is answerable *civiliter* for the defaults of his deputies, by nonfeasance or malfeasance, in the duties of their office enjoined on them by law; and not for a breach of contract made with a plaintiff, obliging themselves to do what by law

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they were not obliged to do. Here the default charged is in not making an attachment of chattels, which he was bound by law to make: the default therefore is a neglect of an official duty, for which the sheriff is responsible.

The verdict must stand, and judgment be entered up according to it.

EBENEZER WELLS *versus* ELIZABETH PRINCE.

Upon the death of a devisor dying seized, the devisee is not seized, until an entry be made for his use, unless the tenements devised be vacant and unoccupied.

The same law applies to a remainder man.

But if a stranger is in possession, under or acknowledging the title of the devisee or remainder man, it is equivalent to an actual entry.

"*ELIZABETH PRINCE* is attached to answer unto *Ebenezer Wells* in a plea of land,—wherein the said *Ebenezer* demands against the said *Elizabeth* one undivided fifth part of the following pieces of land situate in said *Boston*, &c. And whereupon the said *Ebenezer* complains and says that *Francis Wells* of said *Boston*, Esquire, his father, at said *Boston*, on the 3d day of October in the year of our Lord 1766, being seized of all and singular the above described lands and tenements, with the appurtenances, in his demesne as of fee, taking the profits thereof to the yearly value of one thousand dollars, made his last will and testament, duly executed to pass real estate, in writing, and therein and thereby among other things gave and devised the aforesaid lands and appurtenances to his wife, *Susanna Wells*, for and during her natural life, and at her death equally to his sons *Ebenezer*, &c. [naming six others] and his daughters *Catharine*, &c. [naming five others] to have and to hold to the aforesaid sons and daughters and their heirs forever, from and after the death of the said *Susanna:* And the said *Francis*, the testator there afterwards on the same day died so seized of said lands and appurtenances, and the said will of the said *Francis* was there afterwards on the 17th of October, in the same year, duly proved, approved and allowed, whereby the said *Susanna* became legally seized of the same described premises for and during her natural life, and the said sons and daughters of the said *Francis*, the testator, became seized as of fee and right of and in the remainder of the same lands and appurtenances, expectant

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on the death of the said *Susanna*, and afterwards, *viz.* at said *Boston* on the first day of January in the year of our Lord 1795, the said *Susanna*, wife of the said testator, died, and afterwards on the same day at said *Boston*, certain of the said sons and daughters of the said *Francis*, the testator, *viz.* the said *Samuel*, &c. [naming seven others] died without an issue and intestate, by means whereof the said *Ebenezer Wells*, the demandant, became seized of one undivided fifth part of the said lands and appurtenances, as of fee and right, and ought now to be in quiet seizin and possession thereof accordingly. Yet the said *Elizabeth Prince* hath since illegally entered into the same premises, and still unjustly deforces him."

Upon the trial of this action on the general issue pleaded, before *Parker, J.* at the last November term, the demandant proved the seizin of *Francis Wells*, the demandant's father by purchase and the devise as alleged; but there being no evidence of any entry by *Susanna*, the devisee, for life, or of any act of ownership exercised by her during her life, and the demandant never having entered, or in any wise occupied the demanded premises, the judge directed the jury that the action was not maintained, and a verdict was accordingly returned for the tenant.

Upon this direction of the judge the demandant moved for a new trial, and the action stood continued to this term.

And now *Amory*, in support of the motion, argued that a will of lands, duly executed with all the legal formalities, and afterwards regularly proved and allowed, constitutes a seizin, and vests the estate without an actual entry; in the same manner that deeds or other conveyances of lands, &c. signed, sealed, acknowledged, and recorded, pass the same lands, &c. without any other act or ceremony whatsoever(1).

Watkins(2) divides ancestors, from whom an inheritance may be derived, into those who have taken by purchase, and those who have themselves succeeded by descent to the hereditaments claimed; and as to those who have taken by purchase he says, "that the fixing of the property in the pre-"mises conveyed in the person so taking, is sufficient to

(1) *Stat.* 1783. c. 37.
(2) *Law of Descents, c.* 1. § 2.

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" render them transmissible to the right heirs of the person, " in whom the property is so fixed. When a person there- " fore claims by descent from such *first purchaser*, he need " only allege such fixture of property ; and is by no means " obliged to shew an actual seizin in the person, from whom " he claims."

A last will duly proved, &c. as well as a deed duly executed and recorded are understood, by virtue of our statutes relating to those subjects respectively, to *fix* the property in the lands devised or conveyed : and the devisee or grantee may bring his action for possession, without an actual entry and seizin.

The opinion of the court was delivered as follows by

PARSONS, C. J. It appears from the count that the plaintiff demands one fifth part of certain lands therein described. The title he shews is, that his father *Francis*, being seized in fee, devised the lands to his mother *Susanna* for life, remainder in fee equally to him and to his twelve brothers and sisters ; that his father died seized : that thereupon his mother was seized for her life : and upon her death, and upon the death without issue of eight of his brothers and sisters, he claims one fifth of the premises in fee, and of which he is deforced by the tenant.

The demandant, having this title, may have a remedy either by a *Formedon in remainder*, or, having entered after the death of the donee for life, by a writ of entry declaring on his own seizin. He has elected the former remedy, and he must set out the gift, the seizin of the first donee, and his title to one fifth, and that on the death of the tenant for life the right to one fifth remained to him. These are stated in his count, except that, instead of alleging that the right remained to him, he has averred that on the death of his brothers and sisters without issue, and of the donee for life, he by means thereof became seized as of fee and right.

On the trial, he proved the gift, his title to one fifth, and the death of the donee for life ; but gave no evidence of her ever having been seized under the devise. The judge was of opinion that, if his declaration was considered as a count in *Formedon in remainder*, it was necessary not only to *al-*

lege the seizin of the first donee under the gift, but that it must also be *proved*.

As the demandant had also averred his own seizin in fee after the death of the donee for life, and if a verdict had been found for him, the declaration, though very informal, might possibly have been considered as a count in a writ of entry, and the informality cured by the verdict, on the ground that the title was good, but defectively set forth, the judge was of opinion, that on this view the demandant must prove a seizin in himself after the death of the donee: but he gave no evidence of any seizin in himself. The judge therefore directed the jury to find a verdict for the tenant.

This direction is objected to, not on the ground that seizin in the donee must be proved, if the count was considered as in *Formedon*, nor on the ground that the seizin of the demandant need not be proved in a writ of entry on his own seizin, but because, as it is urged, that such is in law to be presumed from the fact that the testator died seized. And a devise by will is compared to a conveyance by deed acknowledged and registered.

Upon considering the objection, we are all satisfied that the opinion and direction of the judge was right. It is a general rule of law, that on the death of the devisor dying seized, the devisee is not seized, until an entry be made for his use, or some other act done, which in law is considered as having the effect of an entry. The exception to the rule is, when the tenements devised are vacant and without an occupant. In such case an entry has been held not to be necessary. For although he may enter on the land, yet there is no person, on whom he can enter. But there was no evidence that the tenements devised were vacant, and it is not a fact to be presumed, The same law applies to a remainder man, who is a purchaser. There must be after the death of the tenant of the particular freehold estate, an entry or an equivalent act, before he is seized, unless the land be vacant and unoccupied.

We have mentioned an act equivalent to an entry. We do not mean to confine this act to a claim, where no entry can be made; but if a stranger is in possession, under or acknowledging the title of the devisee or remainder man, it is equivalent to an actual entry. In the present case, there was no ev-

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idence that the tenant for life died seized, and *â fortiori* the entry of the remainder man, or of some person for him or holding under him, must be proved.

The effect of deeds acknowledged and recorded is not analogous. The statute of 1783. c. 37. provides that conveyances of land, by any person having right to convey, by a deed executed, acknowledged and recorded, shall be good without any other ceremony. The intent of the statute was to provide a substitute for a feoffment with livery of seizin. The livery of seizin is made to give notoriety to the alienation. This purpose is better effected by the registry. But there is no statute, which provides that the probate and registry of a will shall pass the lands therein devised.

Upon the whole our opinion is that the verdict stand.

Leave was afterwards given the demandant to discontinue paying costs.

Dexter and *C. Jackson* for the tenant.

THOMPSON J. SKINNER, TREASURER,

versus

THOMAS PHILLIPS, LATE SHERIFF, AND OTHERS.

The sheriff's bond to the treasurer of the commonwealth is intended for the benefit of individuals, who may suffer by the malfeasance or misfeasance of the sheriff, as well as for the benefit of the commonwealth: and the treasurer is a mere trustee of the bond for the use of those who may suffer by a breach of its condition, whether it be the commonwealth, or private persons.

THIS was a writ of *scire facias*, and it recites—that the plaintiff, in his capacity of treasurer of the commonwealth, by the consideration of the justices of the court of common pleas for this county, holden on the first Tuesday of July, A. D. 1806, recovered judgment against the defendants for the sum of ten thousand dollars: that upon the judgment so recovered, execution hath issued and been awarded for the said *Skinner*, in his said capacity, and for the use of the commonwealth, for the sum of 1536 dollars 46 cents, and execution remains to be done for the residue of the said debt: that the said judgment was rendered upon a bond, bearing date May 7, 1800, made in the penal sum of 10,000 dollars, by the defendants to *Peleg Coffin*, Esq. then treasurer of the commonwealth and his successors, with condition, among other things,

to be void if the defendant *Phillips* should and did faithfully perform and execute all and singular the duties of his office of sheriff of the county of *Hancock*, and answer the malfeasance and misfeasance of his deputies, during his continuance in office, and should and did well and truly fulfil and discharge all the duties and obligations that should be lawfully imposed upon him, as sheriff as aforesaid, as well by the common law as by the acts and laws of the commonwealth: that *Thomas Guillaume* of *London*, in the united kingdom of *Great-Britain* and *Ireland*, merchant, at the supreme judicial court in this county, August term 1804, recovered a judgment against the said *Phillips*, by the name and additions of T. P. of *Hampden*, in the county of *Hancock*, Esquire, and *sheriff of the same county* for the sum of 825 dollars 41 cents damage, and 38 dollars 96 cent for costs of suit, "the said damage having "been suffered by the said *Guillaume* by and through the "misfeasance and malfeasance of the said *Phillips* in his said "office of sheriff as aforesaid: and that the said last recited "judgment has never been satisfied. Wherefore the plaint-"iff avers that the further sum of 859 dollars 37 cents, part "of the said penal sum of 10,000 dollars has become due, "for the use of the said *Guillaume* to satisfy the said last "recited judgment with interest thereon, and prays for a "remedy in this behalf, &c."

To this writ the defendants demurred generally, and the plaintiff joined in demurrer.

Thurston, in support of the demurrer, observed that he was authorized to appear only for the sureties in the bond, and he contended that they were not liable to respond to any individual for the malfeasance or misfeasance of the sheriff. This bond was given in pursuance of the statute of 1783. c. 44. which provides that the bond shall be given by the sheriff to the treasurer for the faithful performance of his duty. That the legislature so understood the force and effect of the sheriff's bond, appears plainly from the statute of 1805. c. 99. which extends the remedy upon it to injuries sustained by individuals. But that statute expressly provides that it shall not be construed to make any surety in any such bond, given before the passing thereof, liable to any suit, which could not theretofore be legally prosecuted against him.

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A further interpretation of the intention of the legislature in the statute of 1783, may be obtained by a recurrence to the acts of this government passed before the revolution. The statute of 11. *W.* 3. c. 6. provides that the sheriff shall give bond to the king at the discertion of the sessions for the due and faithful discharge of his office in all the parts thereof. Very distinct from this is the provision of the act of 10. *Geo.* 2. c. 7. which directs that coroners shall give a bond for their faithful behaviour, the bond to be made payable to the county treasurer, "for the use and benefit of the person or persons that may be injured by the failure of the coroner in that behalf."

From a comparative view of these statutes it is apparent that the legislature intended the bond of the coroner for the benefit of the citizens, and that of the sheriff for the security of the publick interest, which is greatly concerned in the due or unfaithful discharge of the duties of the sheriff's office.

This construction is much fortified by the provisions of the statute of 1783, which gives a penalty of thirty per cent. per annum against sheriffs receiving money due to individuals and refusing or neglecting to pay it on demand: and more strongly still by another provision in the same statute, by virtue of which the sheriff is to be removed from office and a successor appointed by the governor and council, upon application of a creditor, whose execution against him shall have been returned unsatisfied.

In *England* the sureties in the sheriffs recognizance are answerable only to the king. It is therefore that they are required to have lands sufficient within the county(1): which Mr. *Christian* says is the only qualification required from a sheriff(2).

It is apprehended to be an objection even under a general demurrer that the *scire facias* in this case does not shew what the misfeasance or malfeasance of the sheriff was, upon which *Guillaume* recovered his judgment. The sureties of the sheriff should be informed whether it was such as they are answerable for on their bond.

(1) 1 *Black. Comm.* 364.
(2) *Note* 8. *to Chap.* 9. *See also Dalt. Sheriff* 6, 7. 482.

A *scire facias* ought to pursue the original cause of action. Here the original process was instituted for the use and benefit of the government; but the *scire facias* is for the benefit of an individual. The sureties confessed the forfeiture of the penalty to the government, because perhaps they were satisfied that their principal was answerable, but they never confessed it, in a suit instituted for the benefit of the person suing this process. They never have had an opportunity to contest his demand. If the action on the bond had been commenced for the use of *Guillaume*, they would have resisted the demand. At any rate, every principle of law and equity entitles them to be heard on the merits of a demand made upon them, of which by the present process an attempt is made to deprive them.

Gray e contra observed that as he did not at all rely on *English* authorities in support of this action, he did not think it necessary for him to reply to those which had been adduced as having a bearing on the present action.

It is very plain from the whole course of the statutes that have a relation to this subject, that the government has always been anxious to provide as well for the security of individuals, as for the interest of the publick. The statute of 11. *Will.* 3. requires a bond from the sheriff for the due and faithful discharge and performance of his office *in all the parts thereof.* The statute of 1783. c. 44. is equally extensive in its provision on the same subject. And the statute of 11. *Geo.* 2. shews the same, or even greater anxiety to secure the citizens in the case of coroners.

It is worthy of consideration that such security is more necessary for the protection of individuals than for that of the government, which has the appointment of these officers, and the power of removing them at pleasure: it can therefore take sufficient care of the interests of the commonwealth. But individuals are obliged to trust their concerns, however important they may be, to the capacity and fidelity of such persons as the government shall see fit to place in office.

We do not claim the forfeiture of thirty per cent. in this action. Perhaps the sureties are not liable for it. But if they were, it is very clear they can in no event be answerable for more than the penalty of the obligation, into which they vol-

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untarily entered. The provision for a deficient sheriff's removal from office is merely a cumulative remedy; and in truth is as much for the benefit of the sureties, as it puts an end to their responsibility, as for that of a creditor.

This action was pending before the statute of 1805. c. 99. was enacted: it can therefore not be affected by that statute, the object of which, however, was not so much to give a new remedy, or to extend the benefit of an existing one, as to prescribe the mode by which such remedy may be obtained.

To the objection made to the form of this *scire facias*, that it does not state the particular misconduct of the defendant *Phillips*, by which *Guillaume* is a sufferer, it is answered that the present suit is founded on the judgment, in which the misfeasances of the sheriff may be said to be merged. That judgment is in full force, and all we ask is the execution of a portion of it. Had we exhibited in this process never so particularly the grounds of the original judgment upon the bond, as such matter would not now be traversable, it would have been useless and impertinent to recite it.

The opinion of the court was afterwards delivered by

PARSONS, C. J. It appears from the record that *Phillips* having given bond as sheriff, with the other defendants as his sureties, to the state treasurer and his successors, with a condition faithfully to discharge the duties of his office agreeably to the statute of 1783. c. 44: that for a breach of the condition the bond had been sued by the treasurer, judgment recovered for the penalty, and execution had been awarded for the damages that had arisen by the breach of that condition: that one *Thomas Guillaume*, having since recovered a judgment against the said *Phillips*, for damages afterwards arising from the misfeasance and malfeasance of *Phillips* in his office, the treasurer has sued this writ of *scire facias* on the former judgment to have execution for further damages for the use of *Guillaume*, accruing to him from the malfeasance of *Phillips*.

To this *scire facias* there is a general demurrer and joinder. And the defendants insist that on this bond they are not liable for any damages arising from the malfeasance of the sheriff, but such as accrue to the commonwealth.

In *England*, the sheriff, before he receives his patent, must recognize to the king for his revenues, and to the court of exchequer for the execution of their writs and precepts. And the subject, if injured by the malfeasance of the sheriff, could derive no benefit from the recognizance.

The decision of the cause must therefore depend on the construction of our statutes. The provincial statute of 11. *W.* 3. c. 6. directs the sheriff to give security to the king for the due and faithful performance of his office in all the parts of it. The revised statute of 1783. c. 44. directs the sheriff to give sufficient security to the treasurer of the commonwealth for the faithful performance of the duties of his office, and to answer the malfeasance and misfeasance of his deputies; and all services done by him before he give security are declared to be void. But by the statute of 1794. c. 53. it is provided that his services shall not be void, and that he be liable to a fine of 150 dollars for each month he shall execute the duties of his office, before he shall have given such security.

Pursuant to the statute of 1783, the defendant gave bond to the treasurer, with condition, among other things, that he would faithfully execute all the duties of his office, and answer the malfeasance of his deputies. From the manifest import of this condition it is extremely clear that the condition of the bond is broken by the malfeasance of the sheriff in his office, whether the damage occasioned by it accrue to the commonwealth or to any individual. And if the condition be thus broken, the penalty at law is forfeited. What therefore could be the intent of the legislature, in requiring a condition of this extent, if the sheriff could not be liable for certain breaches of it? The inference then is very reasonable, that the intent was, that the sheriff should be answerable for every breach of the condition; and all the relief he can obtain in equity is an exemption from the penalty, on paying the damages occasioned by the breach. And where the commonwealth has received no injury, we ought to conclude that the damages are to be recovered, not for the use of the commonwealth, but of those who have suffered them; and that the state treasurer is a mere trustee of the bond for the use of

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those who may suffer by a breach of its condition, whether it be the commonwealth or private persons.

This conclusion is perfectly analogous to administration bonds given to the judge of probate. They have been required from administrators more than a century, by statutes which did not direct or appropriate the use; but actions have been, during all that time, sued by the judge of probate on such bonds, when the condition was broken. He has recovered damages, and has applied them to the use of the persons, who were injured by breach of the condition, the judge being only a trustee of the bonds. And the statute of 1787. c. 55. does not create or direct the use; but provides for the more convenient execution of the trust, and for ascertaining, in certain cases, the damages occasioned by a breach of the condition.

If we recur to the statutes providing that coroners shall give security, we shall find the intention of the legislature more express. The provincial statute of 10. *G.* 2. c. 6. enacts that coroners (who are authorized to serve all writs and process, in which the sheriff is a party) shall, before they make any service, give security to the county treasurer for their faithfully serving all such writs and processes, for the use and benefit of such persons as may be injured by their failure. The revised statute of 1783. c. 43. requires, coroners, before they enter on the duties of their office, to give security in the same manner sheriffs are by law obliged to. Now by the express words of the statute of *G.* 2. the coroner's bond was given in trust for individuals, who might be injuried by the breach of the condition: and it can hardly be presumed that it was the intention of the legislature, by the revised statute, to take from individuals the security that had been for a long time provided for them. But this security is certainly taken away by the last act, unless sheriffs' bonds are a security to private persons: for now coroners are only to give such security as the sheriff is obliged to give.

The provision of law, that executions do not run against the bodies of sheriffs, does not furnish any argument for the defendants. Whether the judgment be against the sheriff for his misfeasance in office, or for any other cause, his body cannot be taken in execution. The reason of the provision

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is that the coroner has no gaol, but it is the sheriff's. If he were arrested, he could not be committed. But when he is removed for not satisfying the judgment, an *alias* execution may issue against his body directed to his successor.

The statute of 1805. c. 99. does not apply to the present action. Before that statute, a party injured by the malfeasance of the sheriff, if he sought relief by the bond, must have applied to the legislature for leave to put it in suit; and a judgment recovered upon it must have been satisfied in the name of the treasurer, who might transfer the satisfaction to the party injured. By this statute no new construction is put on the bond, but the remedy is simplified by putting it on the same footing with the remedy on administration bonds. The second section of the act is an alteration of the common law; for it enacts that torts of the sheriff shall survive against his executors and administrators: but sureties to sheriffs' bonds then executed are not affected by this alteration.

Upon the whole we are satisfied that any party, injured by the malfeasance of the sheriff, or his deputy, is entitled to relief on this bond: that the bond, as to the remedy upon it, is within the statute of 1793. c. 77. and therefore when judgment has been rendered for the penalty, and further damages accrue by new breaches of the condition, a *scire facias* for a new execution lies, until the penalty be exhausted, for then the judgment will be satisfied.

Judgment for the plaintiff.

JOSEPH HAMBLET & UX.

versus

JOSEPH FRANCIS.

What possession of flats is sufficient to enable the tenant to take a release.

IN this action, which was a writ of *entry sur disseizin*, the demandants claimed certain flats in *Boston* described in the writ, counting on the seizin of *Joseph Hemmenway* their father within fifty years.

Upon *nul disseizin* pleaded, the cause was tried at the last November term in this county before *Parker, J.* from whose

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report of the case it appears that *Thomas Kemble* was seized of the demanded premises in 1779: that on the 12th day of July, 1785, he made a deed, by which, for the consideration of five pounds, he "remised, released and forever quitclaimed" the same premises to *Arthur Noble* to hold to him, his heirs and assigns forever, with a covenant of warranty against the grantor and all persons claiming under him.

On the 4th of August, 1802, *Noble* conveyed the demanded premises to *Francis*, the tenant, who produced and examined sundry witnesses, who testified that on the said 12th of July, 1785, and from that time to the said 4th of August, 1802, and since, whenever occasion required, the said *Noble* and *Francis* successively, by their tenants of a wharf adjoining the demanded premises, had used the said flats, by laying wood-coasters and other larger vessels thereon, and that no vessel of the common size of a wood-coaster could lay at the said wharf without laying in part on the premises.

The demandants also produced a deed of the demanded premises, dated May 12, 1794, from *Kemble* to *Joseph Hemmenway*, from whom they derived their title. Witnesses also swore that *Kemble* and *Hemmenway*, by their tenants of a wharf on another side of the demanded premises, successively used the premises by launching boats from said wharf, on which was a boat-builder's shop, by graving fishing-boats on a part of said flats, and also by bringing materials for boat-building by water up to said wharf.

The judge directed the jury that the estate in question, being flats covered by every tide and used as a dock, was not susceptible of that exclusive possession, which might be had of a dwelling house or farm; that there appeared to have been a concurrent or alternate possession by both parties: that the possession by *Arthur Noble* in July, 1785, and by the present tenant in August, 1802, as testified by witnesses on the part of the latter, was sufficient to give effect and operation to the deeds of those dates: and that, if the jury believed the witnesses, they ought to find a verdict for the tenant.

The jury found a verdict accordingly, and the demandant, waiving his right of review, moved for a new trial for the misdirection of the judge, on the report to be made by him.

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And now *Sullivan*, in support of the motion, observed that the whole question in the present stage of the action arises upon *Kemble's* deed to *Noble*: and he contended that the direction of the judge was wrong, in as much as there was not evidence of such a possession in *Noble* as would give effect to this deed, which he considered to be merely a release.

Releases are said to enure in four ways. There can be no ground to consider the release in this case as enuring but in two of those ways, *viz.* either *per mitter le droit*, or *per enlarger l' estate*. Now that it did not operate in the former of these two ways is apparent from this, that the whole case shews that *Noble* was not in by disseizin, which is the only case in which a release can enure *per mitter le droit*. Neither could it operate by way of enlarging an estate, for the facts do not shew any previous estate in *Noble* to support such an operation(1).

The judge directed the jury that property of this particular description was not susceptible of the same exclusive possession as a farm or a house. But the law knows no distinction, as to the mode of transferring estates, between land which is sometimes covered with water, and the most valuable tenements. The same rules, the same formalities must be observed in one case as in other. Indeed in our seaport towns, property of this description has acquired an immense value.

Jackson e contra. That the deed in question must operate as a release is agreed. *Noble* was in possession by right or by wrong: if by right, he must have been at least a tenant at will, for he could not be a tenant by sufferance, and a tenant at will may take a release of the fee(2). If he was a mere disseizor, then the deed operated as passing the right. So that in one way or the other it was a good and operative conveyance.

It is a general rule of law to give effect to the intention of parties to a deed, if it can be done consistent with the policy of the law. Under this rule, our common deeds of bargain and sale have been construed a feoffment, for the purpose of producing a discontinuance of an estate tail pursuant to the

(1) *Co. Lit.* 274. § 466.—*Hargrave's Notes to Ditto.* 208. 219. 237. 242
(2) *Co. Lit.* 271. *a.*

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apparent intention of the parties. In this case there is an express covenant of warranty against the releasor and all claiming under him: from which it is very apparent that he intended to convey all his estate in the premises.

Though this peculiar species of land is subject to the common rules of law, as to its passing from one tenant to another, yet it is apparent that the same kind of exclusive possession cannot be had in it, as can be had in upland, as by fencing or other permanent monuments; and this was the amount of the judge's direction as to this point. The possession of the tenant in this case was all the possession that could be had of land thus situated.

The opinion of the court was afterwards delivered by

PARSONS, C. J. In this action the demandants count upon the seizin of their father, and upon a disseizin by the tenant. On the issue *nul disseizin*, a verdict was found for the tenant, agreeably to the direction of the judge, which the demandants move to set aside.

The parties claim under *Thomas Kemble* by separate conveyances; and the tenant derives his title immediately under the deed of *Arthur Noble* to him, dated August 4th, 1802, and it is agreed that if *Noble* was then seized in fee of the tenements demanded, which are a parcel of flats below high-water mark, and they were conveyed by that deed to the tenant, then the verdict is right. *Noble* purchased of *Kemble* by a deed, July 12th, 1785,-when it is agreed, that *Kemble* was seized in fee, and that if by his deed the tenements were conveyed to *Noble*, then *Noble* was seized in fee when he executed his deed of August, 1802, to the tenant.

But the demandants insist that no estate in the tenements passed by *Kemble's* deed to *Noble*, he not then being in possession, and the deed being only a release. The evidence for the tenant was, that *Noble*, at and after the execution of *Kemble's* deed to him, used the flats for the purpose of laying wood-coasters and other vessels on them. This we consider as proper evidence of *Noble's* possession to be left to the jury.

If *Noble* was in possession, it cannot be presumed, without evidence, that he occupied for a particular purpose by a special license, or that he was a tenant at sufferance. He must

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therefore be in possession either by right or by wrong; either as tenant at will or as a disseizor. If the former, the release operated to enlarge the estate; if the latter, it passed the estate; and *quâcunque viâ dâta*, *Noble* by virtue of it was seized in fee.

When *Noble's* deed to the tenant, which is also a release, was executed, the tenant had the same possession, which *Noble* had, when *Kemble's* deed to him was executed. The same conclusion must be inferred, that *Noble's* estate in the tenements passed to the tenant, and that the verdict must stand.

As the releasor was seized in fee, and a valuable consideration was paid, whether the release might, or might not be considered as a bargain and sale, or other conveyance to effect the intent of the parties we give no opinion.

Let judgment be entered on the verdict.

ALPHEUS DUNHAM & AL. *versus* CHARLES BAXTER.

If upon a trial the judge, thinking the plaintiff's evidence insufficient to support his action stops the defendant from producing his evidence, and the jury notwithstanding find a verdict for the plaintiff, the court will set aside the verdict, without the defendant's waiving his right of review, he having in fact had no trial.

ASSUMPSIT for money had and received, money laid out and expended, and money lent and accommodated.

Upon trial before *Parker*, *J.* at the last November term in this county, the facts proved by the plaintiff were, that *Baxter*, being a young man acting as clerk in the store of the plaintiffs, engaged in an adventure to the southward with one *Baynes*: that the defendant purchased parcels of goods of the witnesses upon credit, and sent the goods to *Norfolk* by *Baynes*. When called on for payment, *Baxter* stated that *Baynes* had not returned, and that he had not funds to pay. On the return of *Baynes*, he exhibited a bill of exchange purporting to be drawn by *Edward Swarbreck*, in *Savannah*, on *Thomas Burron*, merchant at *Lancaster*, in *Eng-*

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land. The defendant carried one of the witnesses to *Baynes*, and wished him, the witness, to take the bill, and pay himself out of it, and the balance to pay over to the defendant: but he declined. The plaintiffs took the bill endorsed by *Baynes*, and paid debts of *Baxter* to the amount of 600 dollars. They sold the bill to I. H., having endorsed it, and received the amount. I. H. sent it out, and being returned protested, it was taken up by the plaintiffs.

The defendant's counsel was proceeding to examine witnesses, but was stopped by the court, who stated to the jury, that the evidence exhibited by the plaintiffs was insufficient for them to recover upon; that all which appeared was, that the plaintiffs had purchased the bill trusting to the signature of the drawer and endorser; that as they had not required the endorsement of *Baxter*, he was not liable if it should be returned, unless he had, at the time of its transfer to the plaintiffs, by an affirmation that it was a good bill, induced them to take it.

The jury nevertheless returned a verdict for the plaintiffs for 600 dollars: and a motion was made by the defendant's counsel for a new trial. The review was not waived, on the ground that, the verdict being against the direction of the court in matter of law, he was entitled to sustain this motion, without waiving his right of review, which was reserved for the opinion of the whole court.

And now at this term, upon the foregoing report being read, *the court* said they were all satisfied, without considering the legality of the judge's direction, that the cause must be again sent to the jury: the defendant, without any fault on his part, had not been heard: and, although a review is open, in this case they did not require him to waive it, as in fact he had had no trial.

The verdict was set aside and a new trial granted.

Sullivan for the plaintiffs.

B. Whitman for the defendant.

THE CASE OF CHARLES F. NORBERG.

THIS was a *Swede*, wholly ignorant of the *English* language, whose testimony to the grand jury was needed. The court ordered an interpreter to be first sworn, truly to interpret between the court and jury and the witness. The oath was then administered to the witness in *English*, and interpreted to him by the sworn interpreter, as it was pronounced by the clerk.

Where a witness is ignorant of the *English* language, an interpreter is sworn to explain the oath to the witness.

JACOB BARKER *versus* JOHN TABER AND AL. AND TRUSTEES.

WHEN this cause was broken to the court, it appeared that a fictitious trustee had been inserted in the process, in order to give jurisdiction to the court of common pleas in this county, all the other trustees, as well as the principal defendants, being inhabitants of the county of *Cumberland*. *The court* expressed a strong disapprobation of such a practice, and intimated a disposition to animadvert more severely, in case another instance of it should occur.

It is a reprehensible practice to insert the name of a fictitious trustee in a foreign attachment, in order to give to the court in one county a jurisdiction of the suit, the defendant and the other trustees living in another county.

The parties, *viz.* the plaintiff, defendant and supposed trustees, had agreed upon a statement of facts, upon which they submitted to the opinion of the court, whether the persons summoned as trustees should be adjudged trustees or discharged.

By the court. The question whether trustee or not can only be determined upon the sworn answers of the persons summoned to the interrogatories. The rights of others, not parties to this suit, are involved in the question. A practice of this sort may lead to collusion and fraud. We cannot receive the statement of facts, but from the trustees under oath.

The question whether trustee or not depends solely on the sworn answers of the persons summoned to the interrogatories: and the court will not receive a statement of facts agreed to by the plaintiff, defendant and trustees.

B. Whitman for the plaintiff.

C. Jackson for the trustees.

SAMUEL RUSSELL

versus

THE NEW-ENGLAND MARINE INSURANCE COMPANY.

If a policy of insurance be effected in the name of A. as agent for B. this latter cannot maintain an action upon the policy, to recover a loss for the use of C. whom he declares alone interested in the property insured.

THIS action was brought upon a policy of insurance made by the defendants upon the schooner *Argo* and her cargo. The declaration alleges that the policy, being effected in the name of one *Israel Munson* as agent for the plaintiff, was in fact for the use and benefit of *Frederick Evarts* and others, who alone, by the averments in the declaration, appear to have had an interest in the property insured; and that in fact the said policy was effected by the plaintiff at the request of the said *Evarts* and others, who however are not named in the policy, as a party thereto, or as interested.

At the last term of this court, this action was opened to the jury, *Parker, J.* then sitting, when the plaintiff's counsel produced the policy, and offered to prove the interest of *Evarts* and others in the property insured: whereupon the counsel for the defendants moved for leave to bring into court the amount of the premium note, and that then the plaintiff should be nonsuited: which was accordingly done, subject to the opinion of the whole court, whether the averments in the declaration are sufficient to shew a cause of action.

And now, pursuant to the said reservation, *Dexter* and *Blake*, of counsel for the plaintiff, move the court that the nonsuit be set aside, and the cause stand for trial.

In support of the motion, it was contended that policies of insurance are a species of contract, wholly distinct in their nature and construction from all others. As an instance of which, it was said that an agent, making insurance for others, and having himself no interest in the thing insured, may still maintain an action on the policy in his own name. This is peculiar to this specific class of contracts. It would be difficult, if not in some cases impossible, to answer the fair and honest purposes of parties to an insurance, if the contract is to receive in all cases the same rigid construction, which the rules of the common law apply to other instruments and contracts.

It is well known to the court that formerly the practice in *England* was to effect policies in blank, without the name of any insured. This producing some inconveniencies, the statute of 25. *G.* 3. c. 44. was enacted, which required the name of the insured or his agent to be inserted. Some constructions of that statute in the *English* courts having created greater inconveniencies than those which the act was intended to remove, it was repealed by statute 28. *G.* 3. c. 56. And although by this last statute the former practice of blank policies was discountenanced, yet it requires but the name or firm of one person, whether he be consignor or consignee, or the person receiving the order to effect the policy, or the person who shall give the order to the agent employed to effect the policy. The naming of any one of these was sufficient to cover the interest of all those, between whom and the person so named there existed any privity. This statute has received a liberal construction, and *Marshall*(1) says "it ought to receive a construction, according to its true intent and meaning." And he mentions the case of *Wolff & al.* vs. *Horncastle*(2) as in point to shew such liberality. In the case of *De Vignier* vs. *Swanson*(3) it was decided that if the name of the agent effecting the policy be inserted, without naming him as agent, it is sufficient.

It is acknowledged that these statutes have no force here, and they have been cited only to shew the necessity that was found of construing them so as almost to prevent their operation in derogation of former decisions of the courts.

It may be said that the omission of the words "*for whom it doth or may concern*," has a material operation in the effect and construction of this policy. But we apprehend otherwise.

The case of *Graves & al.* vs. *The Boston M. I. Company*(4) may be supposed to be in point against this action. But a very material distinction may be taken between that case and the one under discussion. In that case the policy

(1) *Page* 214.
(2) 1 *Bos. & Pul.* 316.
(3) *Ibid.* 346. *in notis.*
(4) 2 *Cranch's R.* 419.

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was to have effect upon either construction: here if this action is not supported, the policy is wholly void and inoperative.

By the policy in this case, *Russell* the plaintiff caused himself to be insured by *Munson*. It might be that he acted as agent, or in his own right, and by the marine law he may maintain his action according to what shall turn out to be the fact. If he acted as agent, he was under no obligation to name his principal.

This is brought in the name of the agent, and the declaration avers that the policy was made in his name as agent, for the use of the principal, who is averred to have been interested in the vessel and cargo insured to the amount of the sum insured. Thus it is precisely within the rule laid down by Serjeant *Marshall*(5).

Phillips and *C. Jackson*, of counsel for the defendants, were stopped by the court, whose opinion was delivered by

PARSONS, C. J. The policy in this case was effected in the name of *Israel Munson*, as agent for the plaintiff; by which the defendants undertook to insure the plaintiff. He now brings an action on this policy, to recover a loss for the use of *Evarts* and others, who were alone interested in the property insured: and it is made a question for our decision, whether the action can be maintained. We are all of opinion that the action cannot be maintained. From the natural import of the words of the policy, and from the necessary construction of it, no person is insured from loss but *Russell:* and the case of *Graves* vs. *The Boston M. I. Company*, decided both in the circuit and supreme courts of the *United States*, is an authority in point. The distinction attempted between that case and the case at bar, is that *Graves* had an interest, which the policy might protect: here *Russell* had no interest, and the policy will be void. That distinction does not appear to us to make any difference. The alteration of the policy from the old form was made because the assurers would know the persons, for whom they would answer. But if any man having no interest, nor

(5) *Page*, 589.

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calling himself agent to excite the enquiry of the underwriters might cause himself to be insured, the intent and design of the alteration of the policy would be defeated, and the underwriters entrapped to insure the property of a man, whose property they must suppose they had not insured.

Plaintiff nonsuit.

WILLIAM STACKPOLE, JUN.

versus

GEORGE NEWMAN AND AL. AND ISRAEL MUNSON, TRUSTEE.

The exhibiting to one summoned as trustee in a foreign attachment, of a letter of one not a party to the suit, nor claiming the property, and authenticating its signature, but not its contents, by the oath of the trustee, is not enough to introduce the contents of such letter as facts disclosed by the trustee.

IN this action the only question agitated was whether *Munson* was the trustee of *Thun* and *Newman*, the principal defendants.

The facts disclosed by *Munson* in his answer to the interrogatories put by the plaintiff were in substance: that he received in the autumn of 1805, from *Thun* and *Newman*, merchants of *Philadelphia*, a consignment of seventeen hogsheads of molasses, with a bill of lading and invoice enclosed in a letter, stating the shipment to be for the account and risk of *Joseph Hill*, from whom also he received a letter at the same time, in which he refers to the shipment, and gives directions about the sale of the molasses, and the investment of the proceeds. In another letter written shortly after *Hill* mentions *Thun & Newman* as his agents, and directs *Munson* to address the proceeds of the adventure to them on his, *Hill's* account. Sometime after another letter from *Hill* to *Munson* directed him to ship the proceeds of the adventure with an account of the sales of the molasses to Mr. *J. F. Echard*. *Munson* never received any other letter on the subject from *Thun & Newman*, but corresponded wholly with *Echard* and *Hill*, engaging on his part to comply with the directions of the latter as far as in his power, having always regarded him as the original owner of the property.

The plaintiff then produced a paper, purporting to be a letter from *Hill* dated at *Philadelphia* October 4th, 1805, to the defendant *Newman* then in *Boston*, [in which he says,

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"*I just write these few lines to guard you against any* "*evils that may happen from the molasses consigned to* "*Mr.* Munson, *which are in my name, though actually be-* "*longing to your house,*" and in another part of the same letter he adds, "*I have done this to serve you, and should* "*be sorry to have myself exposed.*"] and enquired of *Munson*, if the said letter was in the hand-writing of *Hill? Munson* answered that he believed it to be so, from its resemblance to the other writing of *Hill's* in his possession, but that he had never seen him write his name, nor had he ever seen the paper until it was shewn him in court, and that he knew nothing further of it or its contents.

In January, 1806, *Hill* writes to *Munson*, expressing regret that the proceeds of the molasses had not been received by *Echard*, whom he mentions as his friend, and as having made him considerable advances on account of that consignment.

Munson, when informed of the assignment from *Hill* to *Echard*, which he believes to be *bonâ fide* and for a good consideration, agreed to pay over the proceeds to the latter when they should be received. And he acknowledges to be now in cash on account of them 571 dollars 52 cents.

And now *Morton*, of counsel for the plaintiff, contended that from the whole of the transactions disclosed, it was apparent that this adventure was, and always had been, the property of *Thun & Newman*. Although *Munson* considers himself to be the trustee of *Echard*, the assignee of *Hill*, yet we have *Hill's* own confession that he is not so. And there is the same evidence of the genuineness of the letter containing this confession, as there is to the other letters produced by the trustee, *viz.* his oath that he believes it to be written by *Hill*.

Channing e contra. The letter from *Hill* to *Newman*, in which the supposed confession is contained, was improperly introduced into the cause, and in truth, though here, it makes no part of the answer of the trustee to the interrogatories. If it were properly before the court, yet being collateral to the answer of the trustee, it cannot be considered(1).

(1) *Comstock* vs. *Farnum & Tr. Ante Vol.* 2. 96.

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Hill ought not to be permitted to shew his own fraud. Though *Munson* believes that letter to be *Hill's*, yet he knows nothing as to the truth of the facts asserted or insinuated therein: and if he is adjudged trustee of the present defendants, he is still liable to the action of *Echard* upon his express engagement to him: or, if he is not, the rights of third persons are to be bound by a judgment in this action, to which they are strangers.

The opinion of the court was afterwards delivered by

PARSONS, C. J. [After a brief statement of the answers given to the interrogatories put by the plaintiff.] The statute, on which this process is founded, confines the court in giving judgment to the answers of the trustee on oath, and it has been frequently determined, that no other evidence can be admitted. We have therefore to consider whether the contents of the exhibit, the supposed letter from *Hill* to *Newman*, are to stand as facts disclosed by the answer of the trustee.

It appears from the answer, that the trustee claims to hold the proceeds of the molasses for the use of *Echard*, who is not a party to this suit; and the plaintiff claims to recover them as the property of the defendants. The judgment in this cause will not be any bar to an action by *Echard* against *Munson*. The facts therefore disclosed by *Munson* must be of that nature that he can defend himself against *Echard* by giving them in evidence. Now *Munson* does not know the letter to be genuine, or that the contents are true, or that the letter might not have been recently written by *Hill*, to defeat his assignment to *Echard*. All these facts must be the subject of enquiry in another suit, and may be found against *Munson*, who swears that he knows nothing about them.

It is therefore our opinion that the exhibiting of a letter of one not a party to the suit, nor claiming the property, and authenticating its signature, without authenticating the contents of the letter, is not enough to introduce the contents of such letter as facts disclosed by the trustee. Because *Hill* might have written the letter, and the contents may be wholly untrue: and we cannot presume them to be true, against the claims of third persons.

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Hill's letter therefore can have no other effect in this cause, than it would have had, if the signature had been proved by any other person, as a witness in the cause. And laying out of the case the contents of that letter, it is clear that *Munson* has discharged himself by his answers. If we were to give a different opinion, we should charge him on the presumption of the truth of the contents of *Hill's* letter, and not on the answers of the trustee.

Let *Munson* be discharged.

ISRAEL MUNSON

versus

THE NEW-ENGLAND MARINE INSURANCE COMPANY.

When an abandonment is offered to underwriters by the assured, it is not necessary to produce evidence of the loss under oath.

Where by the terms of a policy of insurance a loss is payable at a given time after notice of the loss, if at the time of abandonment the assured had a right to recover for a total loss, this right will not be affected by the credit given to the assurers in the payment of the loss, although in the mean time the loss has ceased to be total.

THIS action was brought to recover the value of the ship *Aurora*, belonging to *Samuel Russell* and *Hamlet Fairchild* of *New-York*, for whom, and as their agent the plaintiff *Munson* procured her to be insured by the defendants at and from *New-York* to the *Havanna*, and at and from thence to *New-York*, the ship being valued at 9000 dollars, and insured for that sum. Any loss arising under the policy was to be paid in *sixty* days after proof and adjustment thereof. The policy was on ship and cargo, but the demand for loss of cargo was struck out of the declaration, which alleged a total loss by capture.

From the report of *Parker, J.* before whom this cause was tried at the last November term in this county, it appeared that the ship, on her homeward passage, and within a few hours sail of *New-York*, was boarded on the 25th of April, 1806, by an officer and men, from the *Leander*, *Cambrian* and *Driver*, three *British* ships of war cruizing off the harbour of *New-York*, and was carried to *Halifax*, where she was libelled in the vice-admiralty court of that place.

The vessel arrived at *Halifax* on the 7th day of May, and continued in the possession of the captors until the 9th day of June following, when a decree of restitution passed, and she was restored to *Fairchild*, one of the assured, who was also the master and part-owner. On the 8th of May, *Munson*, by orders from *Russell*, one of the assured for himself and *Fairchild*, abandoned the ship and cargo to the company, and it is agreed, communicated to them all the information, which said *Munson* was possessed of relative to the capture.

[By copies of sundry letters on file in the case, it appears that on the first of May *Russell* wrote to *Munson*, stating, from the information of the pilot, who was on board the *Aurora*, the circumstances of the capture and destination for *Halifax*, to which the pilot had made oath; requesting *Munson* to abandon the cargo to the underwriters; promising to send the necessary vouchers in due season; and expressing doubts whether he should abandon the ship. On the 5th of May *Russell* again wrote, and requested *Munson* to abandon all his interest, and that of the master, in the ship *Aurora*, to the underwriters from that day, cautioning him to execute the request in such manner as might be consistent with the law and custom of the place. And on the 21st of the same month he again wrote, and enclosed a certified copy of a letter he had the day before received from the master at *Halifax*, with an affidavit of the same, and a request that it might be handed to the underwriters.]

The ship afterwards arrived at *New-York*, where neither the underwriters, nor the assured chose to take possession of her as their property.

The question was, whether the plaintiff should recover for a total, or a partial loss only. The case was considered by the judge to have been decided by that of *Lee* vs. *Boardman*(1), wherein it was settled that an offer to abandon, during the existence of a total loss, fixes the right to recover the whole sum insured. But *the solicitor general*, who argued the cause for the defendants, having suggested that the case could be distinguished from the one referred to, 1. Be-

(1) *Ante vol. 3. page 238.*

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cause, at the time of the abandonment there was no evidence of the loss exhibited; and 2. Because it appears, from the decree of restitution, that the ship was actually restored before payment of the loss became due; a verdict was rendered for the whole sum, at which the ship was valued, with interest: and the judge reserved the case for the opinion of the court, the defendants agreeing that the sum found by the verdict should be increased by adding interest to the time of judgment, unless a new trial should be granted.

And now at this term *the solicitor general, Davis,* renewed and enforced the points suggested by him at the trial. After which the opinion of the court was delivered, in substance as follows, by

PARSONS, C. J. The jury having found a verdict for a total loss, the counsel for the defendants make two objections to it. The first is that, at the time of the abandonment, no evidence of the loss was exhibited. The capture took place on the 25th of April, 1806, and on the 1st of May following, one of the owners wrote the plaintiff an account of it, and stated that the intelligence was received by one of the pilots, who was on board the ship, and had been turned out by the captor. On the 5th of May he again writes, directing the plaintiff, in consequence of the capture he had mentioned in his last, to abandon the ship and cargo for him and his partner. On the 8th of May, *Munson* communicates these letters to the office, and makes the abandonment according to the directions: and it appears from the report that the intelligence of the pilot was true, and that the ship and cargo arrived at *Halifax*, and were there libelled as prize, and were in custody of the admiralty, when the abandonment was made.

In this case it is our opinion that the evidence of the loss exhibited was sufficient. It came from the pilot, who was present at the capture, and was correct. Nothing can be objected against it, but the want of the affidavit of the pilot, which it is not usual to send; and which he is not obliged by law to make. The master was a prisoner, and could make no protest, which is the usual evidence, when it can be obtained. No objection was made by the underwriters to the

sufficiency of the evidence, which was afterwards fortified by a copy of a letter from the master at *Halifax*, containing a particular account of the capture, which was forwarded on the 21st of May to the underwriters.

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The second objection is, that the loss was not payable, by the terms of the policy, until sixty days after notice of the loss, and that before that time the property was restored.

We do not think there was any weight in this objection. The abandonment was made on the 8th of May, at which time the loss was total, and a right to recover for a total loss was vested in the assured: and this right cannot be affected by the credit given to the assurers in the payment of the loss, whether that credit was long or short.

Judgment must be rendered according to the verdict.

Dexter and *Blake* for the defendants.

SUSANNA LANE, ADMX.

versus

AMASA PENNIMAN AND R. HASKINS, TRUSTEE.

When and to whom freight is payable.

IN this case the question referred to the court was whether *Haskins* was the trustee of the defendant *Penniman?* The reporter was not in court when the point was argued. The facts will appear in the opinion of the court as delivered by

PARSONS, C. J. From the answer of *Haskins*, the facts are that *Nathaniel Windsor* was owner of the schooner *Thomas Jefferson:* that he chartered her to *Penniman*, the defendant, and *Elpalet Loring*, jointly, to make two trips to the southern ports and back: that on her return from *Alexandria* to *Boston*, the trustee had on board 872 bushels of corn, and 244 barrels of flour on freight, to be paid to *Penniman* and *Loring*, the hirers of the schooner, of which *Loring* sailed as master: that on the arrival of the vessel at *Boston*, and before any of her cargo was unladen, *Wind-*

Lane *vs.* Penniman & trustee.

sor, declaring that the hirers had broken their contract, took the vessel from them, turned out *Loring*, the master, and refused to deliver the cargo, unless the freight was paid to him, which he claimed for the wages of the vessel: that *Windsor* accordingly, before the service of the writ, delivered *Haskins* his corn and all his flour, except 40 barrels, which he retains until the freight of the whole is paid to him. The plaintiff insists that *Haskins* is trustee for *Penniman's* moiety of the freight.

If *Haskins* is indebted for the freight, it is either to *Loring* the master alone, in which case he cannot be *Penniman's* trustee, or to *Loring* and *Penniman* jointly. In this last case, we know not whether *Penniman* is entitled, as against *Loring*, to any part of the freight. *Loring* was the master, subject to all the disbursements, and for them had a prior lien against *Penniman* for the freight. *Loring* ought to have been made a trustee, that he might have disclosed the transaction; and if it had appeared that any of the freight was coming to *Penniman*, the plaintiff might perhaps have holden *Haskins* as trustee for that part.

We however are not satisfied that *Haskins* is indebted to *Penniman* and *Loring*, or to either of them, for the freight. Although the master may retain the cargo, until the freight be paid or tendered; yet he must be ready to deliver the cargo on payment or tender. But in this case, upon the arrival of the schooner, the charterers were dispossessed of her, the master turned out, and the cargo taken into the possession of *Windsor*. Part of the cargo *Windsor* has since delivered, and part he retains as security for the whole freight, which he claims on his own account. The master therefore never has delivered the freight, nor has he been ready, or had it in his power to deliver it. And if *Haskins* were now to pay him the freight, he must afterwards sue *Windsor*, to recover his 40 barrels of flour, or the value. On this ground we are satisfied that the defendant's trustee must be discharged.

The *Solicitor General* for the plaintiff.

C. Paine for the trustee.

WILLIAM GREENWOOD *versus* BENJAMIN CURTIS.

THIS was *assumpsit* upon a contract in the following words; *viz.*

" Rio Pongos *on the coast of* Africa, *July* 27, 1802. I " *promise to pay or cause to be paid to the owners, or con-* " *cerned of brig* Hope, *nine four foot slaves, thirty-seven* " *prime slaves, and seventy-six bars on demand for value* " *received of Capt.* Hichborn. Benja. Curtis."

A promissory note not negotiable, given in consideration of a balance found due upon an *insimul computassent*, is not of itself a payment, nor a bar to a recovery in an action on the *insimul computassent*.

The first count alleges, that prior to the date of the foregoing instrument, the plaintiff had become the owner of the brig *Hope* and her cargo, by purchase of one *Humphry Courtney*, and of all the proceeds of said cargo: that *Isaac B. Hichborn* was master of said brig: and that the defendant gave said note as above described.

The second count states the promise to have been made to the plaintiff, to pay the owners and concerned of said brig as aforesaid.

The third count alleges the promise to the plaintiff to pay him according to the note; and concludes with allegations that at the time of making the promises, and until the purchase of the writ, the plaintiff was owner and concerned in the said brig *Hope* and the cargo, and the proceeds thereof, and alleges notice to *Curtis*, and a request to deliver the slaves, &c. according to the promise.

Before the trial a new count was filed under general leave to amend, which was objected to by the defendant, on the ground that it changed the nature of the demand, but the objection was overruled. This count alleges a settlement of accounts between *Curtis* and *Hichborn*, the master of the brig, for the benefit of the plaintiff as owner, and a balance found in bars, equal to 4481 dollars 1 cent, due from *Curtis* to the plaintiff.

The action was tried at the last November term, before *Parker, J.* from whose report of the case, the following facts appear.

The interest of the plaintiff in the brig *Hope* and cargo was proved, according to his allegations. The defence, principally relied on, was that the contract declared on was in violation

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of the principles of the constitution and laws of the state, and of the *United States*, and therefore no action could be maintained on it in the courts of the Commonwealth.

The judge directed the jury to that effect; and further that the plaintiff could not recover upon the *insimul computassent*, because the evidence shewed that the note, described in the other counts, was given in extinguishment of that balance, which note was not void, although payment of it could not be enforced by the laws of this Commonwealth. A verdict was returned for the defendant.

The question reserved for the opinion of the court was, whether the said direction of the judge was right. If they should be of opinion that it was right, then judgment to be entered for the defendant for costs: if otherwise, the verdict to be set aside and a new trial granted.

It appearing to *the court*, according to the terms of the report, that no objection lay to the *insimul computassent*, and that the note given in consideration of it, not being negotiable, could not in law be considered as a payment of it, and therefore that a new trial ought to be granted, as the facts, which may hereafter be disclosed upon such trial, may perhaps entitle the plaintiff to a verdict on that count, a new trial was granted accordingly, neither party opposing it. *Vide* 1. *Burr.* 9. *Rhoades* vs. *Barnes.*

N. B. The defendant's counsel objected to the plaintiff's recovery on the *insimul computassent*, because the items, which composed it, could not be the foundation of a mutual account, on which *assumpsit* would lie. But the ground of his objection was not made part of the report.

Selfridge for the plaintiff.

Channing for the defendant.

THOMAS O. SELFRIDGE

versus

JOHN GILL AND LUTHER RICHARDSON, HIS TRUSTEE.

If the holder of a promissory note prove his demand under a commission of bankrupt issued against the first endorser; and afterwards, but before any dividend is declared under the commission, receive payment of the note from the second endorser, and then receive a dividend under the commission, he shall account to the second endorser for the amount of such dividend, and not to the creditors of the bankrupt.

THE question before the court in this action, *viz.* whether trustee or not, arose out of the answer of the trustee to the interrogatory of the plaintiff, *whether he, the trustee, had any goods, effects or credits of the said* John Gill *in his hands and possession at the time of the service of the original writ upon him?*

The facts disclosed by Mr. *Richardson* are that he held a negotiable note, dated October 6, 1803, for 400 dollars, signed by *Alexander Fullerton*, and endorsed by *James Kerr*, the payee, and also by the said *John Gill*. On the 26th of November, 1803, *Kerr* being declared a bankrupt, *Richardson* proved this demand under the commission. In December following, the note having become due, and *Fullerton*, the maker of it, having also been declared a bankrupt, *Richardson*, still holding the note, pressed *Gill* for security. Having received the assignment of several promissory notes, as collateral security, and giving to *Gill* an obligation to collect the amount of them, and apply it to the payment of *Fullerton's* note above described, on the 25th of June, 1804, he credited *Gill* for the full amount of the note. On the 25th of August following, the commissioners upon *Kerr's* estate declared a dividend, of which *Richardson's* part arising upon the claim above stated, amounted to 326 dollars 16 cents. *Richardson* was also the assignee of *Kerr's* estate under the said commission.

The cause was briefly spoken to by the plaintiff and the trustee.

The plaintiff stated that he was nominally such only, having in fact no personal interest in the suit. He cited *U. S. Bankrupt Law*, § 29.—*Brown* vs. *Bullen*, *Doug.* 407.—1. *Atkins*, 109. *Ex parte Wildman.*

Richardson cited *Cooks's B. L.* 164. *Ex parte Smith.* 1. *Esp. Dig.* 121.—*U. S. Bank. L.* § 54.

The opinion of the court was afterwards delivered by

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PARSONS, C. J. The plaintiff insists that *Richardson* is *Gill's* trustee, upon the following facts stated in his answer.

The trustee held a note made by *Fullerton*, endorsed by *Kerr*, and by *Gill* as second endorser. *Kerr*, the first endorser, became a bankrupt, and the trustee proved his debt, under the commission, arising on the note. He afterwards, and before a dividend was in fact made, demanded payment of the note of *Gill*, the defendant, who paid it. A dividend was then made of *Kerr's* effects by the commissioners among the creditors, including the trustee's claim which had been proved; the trustee being the legal assignee, under the commission of the bankrupt's effects.

The plaintiff insists that the trustee being assignee, must immediately on making the dividend be considered as receiving it, because he was both payer and payee; and having before received the amount due on his note from *Gill*, the dividend, or a part of *Gill's* payment equal to it, must be money received to *Gill's* use.

The trustee contends that his dividend should be divided among the other creditors of the bankrupt, and that *Gill* should be left to his remedy against *Kerr*, or prove his demand under the commission against *Fullerton*, the maker, who has since become bankrupt.

The case of sureties under the bankrupt laws, who are absolutely liable, but, having no cross security, cannot prove their claims, because they are not creditors at the time of the bankruptcy, is a very hard one. The remedy against the bankrupt is generally useless, unless to gratify resentment, or to to harrass an unfortunate debtor. To relieve a surety thus situated, as far as it can be done consistently with our bankrupt act, is to be desired. The holder of the note, if he does not call on his surety, until after he has received his dividend, must credit the surety with the amount of his dividend. But it is insisted, that if the holder demand and receive payment before the dividend be made, the surety can derive no benefit from it.

The surety certainly lies at the mercy of the holder of the note, whether he will prove his claim or not; or, if he has proved it, whether or not he will strike his name out of the

list of claims, and receive no dividend. But when a dividend has been made on his claim, the matter appears by our bankrupt law to be fixed. The claimant is entitled to his dividend, and no court is authorized to prevent his receipt of it, or to cause it to be distributed among the other creditors. As to the dividend, the commissioners are *functi officio:* they may make a second dividend, but they have no power over the first.

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In this case *Richardson*, being assignee, has already received his dividend; and the other creditors have no remedy against him to refund it. Having received it, he ought not to hold all the full payment he received of *Gill*, but must be considered as holding a part of it, equal to his dividend, for the use of *Gill*.

Richardson is therefore a debtor of *Gill*, and must be adjudged his trustee.

THOMAS DAWES, JUN. ESQ. JUDGE, &c.

versus

JOSEPH HOWARD AND AL.

THIS was an action of debt on a bond given by the defendants to the judge of probate, as sureties with *Samuel Treat*, deceased, upon his being appointed guardian to his five minor children. The writ was thus endorsed. "This suit is commenced for the benefit of *Samuel Treat*, *Maria Treat*, *Ann Treat*, *Mary Treat*, and *Lucius Junius Treat*, children of *Samuel Treat*, deceased, and heirs of *Lemuel C. May*, deceased."

The father of minor children having property of their own, is notwithstanding bound, if he has ability, to support them: otherwise of the mother.

Where a father, having little or no property of his own, takes the guardianship of his children so situated, he will be allowed a reasonable charge for their board in his family during their minority.

The defendants confessed the forfeiture and prayed to be heard in chancery.

The court appointed two commissioners to hear the parties, and to receive and state the account of said *Treat*, exhibited by the defendants (consisting of charges for the

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maintenance of the said children) which the defendants prayed to be allowed in mitigation of damages claimed by the plaintiff in this action.

The commissioners reported, that the deceased guardian had received sundry sums of money for his minor children, as they were legatees named in the last will of *Lemuel C. May*, deceased, amounting in the whole to 2452 dollars 70 cents: that as to the account exhibited by the defendants, they found no charges made by the late guardian in his lifetime, nor any vouchers among his papers in support of said account, which they say was wholly assumed by the defendants, his sureties, as what they suppose he would have been entitled to exhibit and claim, had he seen fit so to do: that the charges were all reasonable: that he did in fact support his said children during the time the said account charges: and that he had little or no property of his own.

Heard, for the plaintiff, argued that the deceased father of these minors was bound to provide for their maintenance(1).

In *England*, when a parent is poor and unable to support his children, the chancellor may direct the interest of their funds to go in aid of the parent, but not the principal, except for the advancement of the minor, as the apprenticing him out, which is only changing the principal, not diminishing it.

It appears that the account offered by the defendants is wholly assumed by them. No charge was made by the father in his lifetime against the children, and as the father was under a natural obligation to support his children, no implied promise could be raised.

Thurston e contra contended that the practice had been to go behind the interest, if that proved insufficient(2). *Comyns* says, "The court may make a liberal allowance out of the infant's estate to a mother, a guardian, who is in distressed circumstances(3)." And our law makes no distinction in this respect between fathers and mothers. [*Chief justice.* That is true in the case of pauper children, but

(1) 1 *Black. Comm.* 448.—1 *Brown's Cha. Rep.* 388. *Hughes* vs. *Hughes.* *Ibid.* 268. *Billingsley* vs. *Cricket.*
(2) 1 *Vern.* 254, 5. *Barlow* vs. *Grant.*
(3) 2 *Com. Dig. Chancery*, 3. *O.* 1. 2.—3 *R.* 6.

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where minor children have property of their own, the father is notwithstanding bound to support them, if of ability: but it is otherwise with the mother.]

Heard in reply. If a stranger had been guardian, and the father died, could his administrator recover against the guardian the amount of the board of the children, while living with the father, he having never made any charge thereof, and there being no evidence that he intended to do so? If the administrator in such a case could not recover, the present defendants stand on no better ground as to obtaining relief.

The court, after considering this cause, observed that, although in *England* guardians of infants were not permitted to trench on the principal of the funds belonging to their wards in any case, unless leave has been first given by the chancellor, upon application to him; our statutes have altertered the law in this respect, and have even made the real estates of minors liable to be sold for their support and education, when the personal estate shall be insufficient.

In the present case they ordered the late guardian's account to be charged with interest on the several sums received by him, and to be credited with the support of the minors at the rate of one dollar per week for each, and execution to issue for the balance of the account thus adjusted.

WILLIAM CLAP *versus* SHUBAEL BELL.

The sheriff cannot retain goods attached by him on mesne process after judgment is rendered for the defendant although the plaintiff reviews the action.

THIS was a writ of replevin brought to replevy certain chattels which the defendant, who is a deputy sheriff of this county had attached as the property of the present plaintiff.

By a statement of facts, upon which the opinion of the court was given, it appeared that *Brazier* and *Davis* in February, 1803, commenced a suit against *Clap*, on which the defendant *Bell*, attached the goods in question. On the 8th day of January, 1806, a verdict was given for *Clap* in that suit, and judgment rendered thereon for costs against the then plaintiffs. On the 13th of February following,

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Brazier and *Davis* sued a writ of review of that judgment, which was duly served on *Clap* on the 21st of the same February, and was still pending. On the 15th of October, 1806, *Clap* sued this writ of replevin, having previously demanded the goods of *Bell*, who refused to deliver them, by the direction of *Brazier* and *Davis*, they claiming a right to hold them under the attachment, until the determination of the said review.

Blake, of counsel for the defendant, was called on by the court; and he contended that under the existing statutes a review must be considered as a continuation of the original suit, being confined to the same pleadings, &c. The provision in this respect was very different from the old statutes on the subject, under which a review is considered as an original suit. By the statute of 1784, c. 28. § 11. "all "goods and estate attached upon mesne process for the se- "curity of the debt or damages sued for, shall be held for "the space of thirty days after *final* judgment, to be taken "in execution." Now it seems to be absurd to call that a final judgment, which the party against whom it is rendered may cause to be reviewed, and of which he may suspend the execution. It resembles more the judgment of an inferior court from which there lies an appeal, in which case goods attached are still held to respond the judgment of the court having the appellate jurisdiction.

C. Paine, on the other side, was stopped by the court whose opinion was the next day delivered by

PARSONS, C. J. Bell, the deputy sheriff, contends that on the facts in this case the attachment continued in force, and that it was his duty to retain the goods notwithstanding *Clap's* demand. But we are all of opinion, that when goods or estate are attached by virtue of an original writ to secure the judgment, which the plaintiff may recover, if on the appeal judgment be rendered for the defendant, the attachment is *ipso facto* dissolved; and the sheriff can no longer retain the property attached against the demand of the defendant. If the plaintiff should recover judgment, and should delay delivering his execution to the sheriff for thirty days, then the attachment is also dissolved. According to the agreement of the parties in this case, the defendant must be called.

EZEKIEL DECOSTER

versus

EDWARD ST. LOE LIVERMORE.

Where the payee of a negotiable promissory note exhibits and proves his demand under a commission of bankruptcy issued against the promissor, upon a dividend declared the assignee of the bankrupt is liable to attachment as the trustee of the payee, notwithstanding the note afterwards appears to have been negotiated to a third person.

THIS was a *scire facias* against the defendant who had been summoned, in an original suit by the present plaintiff, as the trustee of *Lemuel Cox*.

The defendant upon the return of the *scire facias* submitted to an examination, and stated that on the 28th of July, 1803, he being assignee of the estate of E. B. jun. a bankrupt, and against whom a commission of bankruptcy was then in prosecution, and having in his hands certain monies belonging to said estate, the commissioners ordered a dividend of 25 per cent. which dividend amounted, on two certain debts proved by said *Cox* under said commission, to 469 dollars 69¾ cents, which the defendant acknowledged to have in his hands at the time of his examination, subject to legal disposal. After the defendant was summoned in the original suit referred to in the *scire facias*, two notes of hand, which appeared to have been, and which the defendant verily believes to have been the proof of the said debts, were shewn to him in behalf of *Betsey Dudley*, daughter of the said *Cox*, whose name was endorsed thereon, and the money in his hands as aforesaid was demanded of him as the property of the said *Betsey Dudley:* which said notes are particularly set forth and described in an affidavit of the said *Cox* exhibited by the defendant, in which the said *Cox* swears that the said notes were endorsed by him to his said daughter, and are and were before the bankruptcy of E. B. jun. her property, and that he exhibited them before the commissioners as her agent: that the said affidavit was presented to the defendant on the 15th of October, 1804, in behalf of the said *Betsey Dudley:* that no other proof was ever exhibited to him of the said assignment: but the defendant says he has no cause to disbelieve the facts stated in said affidavit: and whether he is trustee of the said *Cox* upon these facts, he submits to the court.

The court observed that there was ground to suspect management between *Cox* and his daughter, that *Cox* stated no

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consideration for the assignment in his affidavit, that the daughter had not appeared in the business, until after the debt was attached in Mr. *Livermore's* hands: and that if *Cox* had received his daughter's money, she might bring her action for it.

The defendant was adjudged trustee.

JOSEPH WRIGLEY

versus

JOHN G. GEYER AND —— WHITNEY, HIS TRUSTEE.

A promise to perform labour for another to a certain amount is not a credit liable to a foreign attachment until the promise be broken: after the promise is broken, the agreed value of the labour is liable.

IN this case *Geyer*, the principal defendant was defaulted upon the return of the writ.

Whitney, the trustee, upon his examination, stated that he "owed to said *Geyer* and his partner *James Cook*, at the time of the service of the writ upon him, the sum of ninety dollars and ninety-six cents, which by his agreement with them was *to be paid in* mason's work and materials.

Upon this statement, the question before the court was whether *Whitney* was the trustee of *Geyer?*

Curia. *Whitney* had no effects in his hands liable to be attached by this process, as the effects of *Geyer*. A promise to perform labour for another to a certain amount is not a *chose in action* attachable, until the promise be broken, after which the promisee is entitled to receive the agreed value of the labour in money. But from the answer the labour, and not its value in money, was due to *Geyer* and his partner, when the attachment was made.

Trustee discharged.

W. Austin for the plaintiff.

S. D. Parker for the trustee.

EDWARD EDES AND AL. ADMRS. *versus* JAMES GOODRIDGE.

EJECTMENT on a mortgage given to secure the payment of a bond, dated October 23d, 1778, conditioned to pay 220*l.* lawful money in one year with lawful interest from the date. The following payments were endorsed upon the bond, *viz.* June 17th, 1785, 31*l.* 14*s.*—December 20th, 1793, 16*l.* 10*s.* 3*d.*—October 16th, 1794, 11*l.* 2*s.* 2½*d.*

In computing the amount due on a security for money given during the revolutionary war, when the current paper money was depreciated, and on which payments have been made in specie since the war, the original sum must first be reduced by the scale of depreciation, and interest cast on the reduced sum, until the first payment.

The plaintiffs had computed interest on the principal sum at its nominal value to the time of the first endorsement, and then deducted the amount endorsed; and having then reduced the remainder by the scale of depreciation established by law, had calculated interest upon it to the time of the second endorsement.

But *the court* said it was clear that the principal sum must be reduced by the scale of depreciation, and interest cast upon its reduced amount to the time of the endorsement, and in this manner the sum due on the mortgage must be ascertained.

Judgment was accordingly entered that on payment of the sum of 114 dollars 43 cents the mortgage should be discharged.

Gay for the plaintiffs.

Sullivan for the defendant.

ISAAC HICKS *versus* HANNAH ATKINS, ADMX.

THIS was an action of debt upon a bond for a review. The condition recites a judgment recovered in the court of common pleas in January then last by the plaintiff, against *Joseph Howard* the principal obligor for 3277 dollars damage and costs, taxed at 8 dollars 71 cents, and that this court, on

Where a defendant, against whom a judgment is given, reviews the action, and gives bond to prosecute his review to final judgment, and to pay the damages and costs which the original plaintiff may recover upon the review, or the original judgment and interest thereon; and after entering the review becomes nonsuit: in an action upon the bond, the original plaintiff shall recover the amount of the first judgment with interest thereon. But whether for the costs of the nonsuit, *dubitatur*.

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the petition of the said *Howard*, had granted a review of the action, in which the said judgment was rendered and a stay of execution, and concludes thus, "*now if the said* Joseph Howard *shall and do prosecute his writ of review aforesaid at the next supreme judicial court in said county, in due form of law to final judgment thereon, and shall pay all such damages and costs as the said* Isaac Hicks *may and shall recover against him on the same writ, or the original judgment herein first recited, with interest in case the same writ of review shall not be prosecuted as aforesaid, then this obligation to be void, otherwise of force.*" The defendant's intestate, *Gibbs Atkins*, executed the bond as surety.

Upon oyer had of the bond and condition, the defendant pleads in bar of the action that the said *Howard* did prosecute the said writ of review, &c. [in the words of the condition] as by the records of said court, in said court remaining will appear.

The plaintiff, in his replication, prays oyer of the said records, and has it. From the record it appears that *Howard* sued out his writ of review, and entered it at August term, 1804, from whence it was continued from term to term until November, 1806, at which last mentioned term *Howard* became nonsuit, and *Hicks* had judgment for his costs taxed at 55 dollars 79 cents. The plaintiff then demurs generally to the plea in bar, and the defendant joins in demurrer.

Phillips, for the plaintiff, argued that *Howard* did not prosecute his review to final judgment, but by becoming nonsuit had failed so to do, whereby the condition of the bond was broken, and the penalty became forfeited. If a hearing in equity is claimed, the plaintiff holds himself entitled to recover in this action the amount of the first judgment with interest by way of additional damages, and the costs of the review.

Whitman, for the defendant observed that this action, being against a surety, was less to be favoured than a like action would be, if brought against a principal, whose own fault or laches had caused the forfeiture.

But he contended here was no forfeiture of the penalty. *Howard* did prosecute his writ of review to final judgment, for a judgment rendered on a nonsuit is as truly a final judgment,

as one rendered on a verdict or demurrer. If he had failed to enter his action, the bond must have been forfeited, but not so when the action is entered and prosecuted from term to term, as was the case here.

But if the court should consider the penalty forfeited, the utmost the plaintiff can claim in equity is the costs of the review, together with the interest of the original judgment, for this is all he has lost by the review. Against this the defendant is not disposed very earnestly to contend.

The opinion of the court was delivered by

PARSONS, C. J. *Joseph Howard*, the principal in this bond, had, on petition to this court, obtained leave to review an action, in which the plaintiff had recovered judgment against him, and on giving the bond execution was stayed.

By the condition of the bond, *Howard* was, among other things, to prosecute his writ of review to final judgment, and to pay such damages and costs as *Hicks* should recover against him on that writ, or the original judgment with interest in case the writ should not be so prosecuted. *Howard* sued out his writ of review, but was afterwards nonsuit, and upon the nonsuit *Hicks* recovered his costs, which have never been paid. The facts are stated in the pleadings, and there is no question but that the condition of the bond is broken and the penalty forfeited. And the defendant seems to admit that *Hicks* on this bond can recover the costs of the nonsuit, which have not yet been paid, with the interest upon the first judgment.

The defendant then prays to be relieved in equity against the penalty, and insists that the review was prosecuted to final judgment within the intent of the condition, and that *Hicks* can have judgment only for the costs upon the nonsuit, with the interest of the first judgment as additional damages.

But we are all of opinion that the plaintiff shall have execution for a sum equal to his former judgment, with interest thereon and costs: that the writ of review was not prosecuted to final judgment, the plaintiff having become nonsuit, in which case the former judgment was to be paid with interest.

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The court having some doubt whether the costs of the nonsuit could be recovered on this bond, as the damages and costs to be paid on review are such as are recovered on final judgment, the plaintiff agreed to waive the costs, and to take his execution for a sum equal to the former judgment with interest thereon; and to take out his execution against *Howard* on the judgment for costs on the nonsuit.

THOMAS DAWES, JUN. ESQ. JUDGE, &c.

versus

WILLIAM BELL AND AL.

In debt on a bond made by a guardian of two minors to the judge of probate, it appeared that the guardian had been cited to settle his guardianship accounts, but had neglected so to do: after the suit was commenced on the bond, the accounts were settled, and a balance found due from the guardian to one of the wards, and from the other ward to the guardian: the bond was adjudged to be forfeited, and execution awarded for the first ward for the balance found due to him, and for the other for nominal damages only, and a third execution for the costs for the use of the two wards jointly.

DEBT on bond for the faithful performance of the trust of guardian. The action was brought for the benefit of *John S. Richards* and *Sarah Richards* a minor, whose names were endorsed on the writ, and to whom the said *Bell* was guardian. The defendants confessed the forfeiture of the bond, subject to the opinion of the court as to their liability to the said *John* and *Sarah*, or either of them, on the following facts.

It is agreed that the said *Bell* did, after the commencement of this suit, duly settle his accounts at the Probate office as guardian to the said *John* and *Sarah*, and it appeared that there was due from him to the said *John* the sum of 30 dollars 94 cents; but that nothing was due from him to the said *Sarah*, who on the contrary owed him the said *Bell* the sum of 14 dollars: It is further agreed that, before this action was brought, the said *Bell* had been duly cited to appear before the Judge of Probate to settle his accounts as guardian to the said *John* and *Sarah*, but that he neglected to do it: that he had been thereupon removed from his office of guardian to the said *Sarah*, and another person appointed in his stead.

Judgment is to be rendered in favour of said *John* for the sum of 30 dollars 94 cents with the interest, which has since accrued: and it is referred to the court to direct what costs shall be taxed for the parties or either of them.

Dawes, Judge, &c. *vs.* Bell & al.

By the court. It appears that the guardian, by refusing to account when cited, has broken the condition of his bond; and there must be judgment for the Judge of Probate to have the penalty. It is agreed that 30 dollars 94 cents are due to *John*, for which execution must issue: that nothing is due to *Sarah*, and therefore as to her, nominal damages must be awarded. And as the damages due to the wards, are exclusively for their benefit, let executions issue specially for their use; so that they may receive the satisfaction immediately from the debtors or the sheriff. The costs in their nature are joint; therefore an execution for the costs must issue for the use of the two wards jointly.

Thatcher for the plaintiff.

Thurston for the defendants.

BENJAMIN LAMPHEAR *versus* HENRY A. LAMPREY.

Appeals from the court of common pleas must be from the final judgments of that court, except in the case of an interlocutory judgment in abatement, account, or partition, which are specially provided for by statute.

But if the court below arrest the judgment, or send the parties out of court without giving any judgment, in cases where an appeal lies, the aggrieved party may claim an appeal and this court will sustain it, although the court below disallow it.

AT the court of common pleas this action was permitted to be entered on the 27th day of the term, after which *Charles Smith*, who was the defendant's bail in this action, comes into court, and for himself and his principal moves the court that the action may be dismissed, or the plaintiff become nonsuit; suggesting as a reason, that since the beginning of the term the defendant has left the state, although he was here and ready to be surrendered on the first day of the term, if the action had been then entered, as by law it ought to have been; and as it would have been, but for the negligence of the returning officer, which reason the said *Smith* says, is not sufficient in law to empower the court to cause said action to be entered.

The court below refused the motion, from which refusal as from a judgment the said *Smith*, for the defendant claimed an appeal to this court, which was disallowed by the court below.

Lamphear *vs.* Lamprey.

And now it is moved, in behalf of the defendant, that the court here will sustain the appeal, which was thus disallowed by the court of common pleas.

PARSONS, C. J. We are all of opinion that the appeal cannot be sustained. By statute, a party aggrieved at any judgment of the common pleas may appeal to this court. The judgment is to be understood to be the final decision of the court, except in interlocutory judgments in abatement, account or partition, which are specially provided for. We say final decisions, for if the court arrest the judgment, or send the parties out of court without giving any judgment; from such determination of the cause by the court, in cases where an appeal lies, the aggrieved party may claim an appeal; and if it be disallowed, this court will sustain it (1): otherwise there would be a total failure of justice. In the present case, there was no determination of the cause, and the party putting his *gravamen* on the record, might upon an appeal from the final determination of his cause, have obtained relief here, if it appeared that he had been injured.

L. Richardson for the plaintiff.

Selfridge for the defendant.

(1) *Ante Vol.* 2. 141. *Bemis* vs. *Faxon.*

RICHARD CASWELL *versus* OLIVER WENDELL.

For the breach of a covenant of seizin, the damages due are the value of the land at the time of the conveyance and interest thereon to the time of the judgment.

THIS was an action of *covenant-broken* on a deed, by which the defendant, as surviving executor of the last will of *John Erving*, Esq. deceased, conveyed several parcels of land to the plaintiff, and one *William Tyler*, deceased, in fee. The defendant covenanted that *Erving*, in his lifetime, and at the time of his death, was lawfully seized in fee of the premises, that they were free of all incumbrances, that he had good right to convey the same by virtue of said last will, and that he would in his said capacity of executor, warrant and defend the same against the lawful claims and demands of all persons.

The breaches assigned by the plaintiff are, that *Erving* was not lawfully seized, &c.: that the premises were not free of all incumbrances: that the defendant had not good right to convey, &c.: and that he hath not warranted and defended the same to the plaintiff: But one *Robert Rand* and others, being rightful owners of one of the parcels conveyed, have entered upon and taken possession thereof and evicted and amoved the plaintiff therefrom, and still continue lawfully to hold and enjoy the same.

The defendant pleads in bar, 1. That *Erving* was lawfully seized, upon which issue is joined. 2. That the premises were free of all incumbrances at the time of the execution of the deed declared on, upon which issue is also joined. 3. The third plea sets forth the seizin of the testator, the making of the will, the death of the testator, the probate of the will, the authority given by it to the executors to sell the real estate, the death of the other executors, and concludes that the defendant, as surviving executor, had, by virtue of the power given in the will, good right to sell, &c. according to the true intent and meaning of his covenant in that behalf made, &c. and this he is ready to verify: wherefore, &c. In his replication to this plea, the plaintiff denies the seizin of the testator, on which issue is taken. 4. The fourth plea alleges that the said *Robert Rand* and others did not lawfully enter, &c. upon which issue is joined.

These four issues were tried at the last November term before *Parker, J.* who directed the jury, if they found that *John Erving* was never seized of the land in his lifetime, so that the executor, at the time of entering into the covenant had no right to sell, they would give such part of the consideration money with interest in damages, as they should find applied to the piece of land in question, one moiety thereof belonging to the plaintiff: but if they found the second and forth issue for the plaintiff, *viz.* that he had been evicted by superior title, according to the allegation in the declaration, or that the estate had been incumbered by *Erving* before the execution of the deed, as there was a covenant to warrant and defend in the deed, they would consider the value of the land at the time of the eviction as the proper

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measure of damages. The jury found the first and third issues for the plaintiff, and assessed damages according to the judge's direction: the other issues were found for the defendant. The judge certifies that in his opinion the verdict is conformable to the evidence in the case; and refers to the decision of the court the question whether his direction was right on the subject of damages: and whether this action can be maintained against the defendant in his private capacity is reserved at the request of the defendant's counsel.

And now at this term the defendant waived all objections to the verdict, and is content that judgment be rendered upon it. [*Note. It was understood that the heirs of* Erving, *the testator, had engaged to indemnify the defendant*].

Curia. As to the plaintiff's objection, we are satisfied that the direction of the judge, as to the rule of assessing damages, was right. No covenant appeared to be broken, but the covenant that *Erving*, the testator was lawfully seized. That covenant was broken at the time the conveyance was executed: and the value of the land at that time, as agreed by the parties, with interest, is the measure of damages.

Let judgment be rendered according to the verdict.

G. Blake for the plaintiff.

C. Jackson for the defendant.

See the cases of *Marston* vs. *Hobbs, ante vol.* 2, 433. and *Bickford* vs. *Page, ibid.* 455.

JOSIAH CROSBY *versus* JOHN PARKER.

Land is described in a conveyance to A. as bounded on B's land: B. owned at the time a piece of land, and had contracted to purchase another piece adjoining, which he occupied as his own, but had received no conveyance of it at the time of the conveyance to A, although he had paid the price for it: it was held that A's land was bounded by the land *owned* by B. and not by that *occupied* by him.

The words "*with all the buildings thereon,*" in a conveyance of land have no legal effect.

THIS was a real action pending in *Middlesex*, in which the demandant counted upon his own seizin, within twenty years, of a parcel of land in *Billerica*, and on a disseizin by the tenant,

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As to part of the land demanded, the general issue was pleaded, and tried at the sittings after the last October term at *Cambridge*, before *the chief justice*, whose report follows.

"On the trial of this issue it appeared that the demandant's title was derived from *Elizabeth* and *Alice Jefts*, by their deed to him in fee, dated February 18th 1805: that among the bounds of the land so conveyed was the following, "beginning at the north-east corner at a stake and stones by "*Joseph Wilson's* land on the highway leading from the "meeting-house to *Salem*:" that the grantors also sold "*all* "*the buildings* on the land standing:" that the said *Joseph Wilson* was, when the said deed was executed, seized in fee, and in the actual possession, by virtue of a deed from the same grantors, of a parcel of land situate to the northward of the premises, the south-eastern corner bound of which was a stake and stones by the same highway, which the tenant insisted were the stake and stones referred to in the demandant's deed: that in the early part of the year 1804, the same *Wilson* had contracted with *John Jefts*, a brother of the said grantors, and for whom he acted as agent, for the purchase of an half acre of land adjoining on the southwardly end of the land he had purchased as aforesaid, and had paid him for it, but no conveyance was made of it to *Wilson*: that *Wilson*, relying on said contract, took possession of the said half acre, and fixed a stake and stones at the south-eastern corner thereof, on the same highway, as a corner bound: that the demandant insists that this last mentioned stake and stones were those referred to in his said deed: that *Wilson* occupied the said half acre for his own use in the years 1804 and 1805, calling it his own: but he declared on oath, that if questioned as to his title to it, he should have freely stated, that he had only contracted for a conveyance, which had not been executed: that afterwards in 1806, he applied to the said grantors for a conveyance, who refused to give it, and he then abandoned the occupation of the half acre: that on the same 18th of February, 1805, after the execution of the said deed to the demandant, the same grantors, by a deed duly executed, conveyed to the said *John Jefts* another parcel of land adjoining on the

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southwardly end of the land conveyed as aforesaid to the demandant: that on the 20th of January, 1806, the tenant, having recovered a judgment against the said *John Jefts*, levied his execution on the northern part of the premises conveyed to the said *John* as aforesaid, which execution was duly returned and recorded; the tenant having no knowledge that the said *John Jefts* had, as agent for the said grantors, contracted with the said *Wilson* to sell him the said half acre: that if the demandant's land was bounded at the first mentioned stake and stones, there would be a barn only on the land he purchased: but if it was bounded at the second mentioned stake and stones, there would be on the said land the same barn, and also a dwelling-house: That in May, 1802, the said grantors purchased in fee all the land comprised in both their said deeds, however they might be bounded, of one *Solomon Pollard*, who expressly sold them *with all the buildings standing thereon*, when in fact there were no buildings whatever on those lands, the house and barn aforesaid having been afterwards erected: that if the first mentioned stake and stones are those referred to in the deed aforesaid to the demandant, then the premises demanded in the writ are not comprised in that deed, and the demandant has no right to recover: but if the second mentioned stake and stones are those referred to in the said deed to the demandant, then he has a good right to recover in this action the demanded tenements, the same being comprised in that deed.—Upon these facts which were not contested, I directed the jury, that as the demandant's land was bounded on a stake and stones by *Joseph Wilson's* land, these stake and stones must, in legal construction, be those first mentioned; because they were a corner bound of land, which was *Joseph Wilson's*: and not those secondly mentioned; because they were a corner of land which was not *Joseph Wilson's*, but which he had occupied, without claiming any right or title to hold the same: and therefore that their verdict ought to be for the tenant. The jury found accordingly; and the demandant moves for a new trial, for this direction."

The action was continued *nisi*, and at this term, no argument being had, the opinion of the court was delivered as follows by

Crosby *vs.* Parker.

PARSONS, C. J. A verdict in this action was found for the tenant, which the demandant moves to set aside, that he may have a new trial.

The point in dispute may be easily stated, without having recourse to all the boundaries mentioned in the case, to understand which a plan might be necessary.

Elizabeth and *Alice Jefts* were once seized in fee of the several parcels of land mentioned in the case, one of which was claimed by *Joseph Wilson*, another by the demandant, and a third by *John Jefts*, by separate deeds from *Elizabeth* and *Alice*, and under *John Jefts*, the tenant claims: and to find the issue in the cause it was necessary to ascertain the north-east corner of the parcel of land conveyed to the demandant by the deed of the said *Elizabeth* and *Alice*, dated February 18, 1805. This deed places the north-east corner at a stake and stones by *Joseph Wilson's* land on a certain highway. The next enquiry then is, where was *Wilson's* land? He had before purchased his parcel of the same grantors by a deed duly executed, and the stake and stones standing by this land of *Wilson's* is agreed. The tenant insists that this stake and stones is the north-east corner of the demandant's land: and if it is, the verdict is right. The same *Wilson* had contracted with *John Jefts*, the brother and agent of the grantors, and had paid him for half an acre of land to the southward of his first purchase, and adjoining on the same highway, at the south-easterly corner of which was a stake and stones by the same highway, which would be the north-east corner of *Crosby's* land, if it bounded northwardly on the half acre, which he contends that it did: and if this last stake and stones is the north-east corner of *Crosby's* land, the verdict is wrong. The question is therefore reduced to this, whether *Crosby's* land adjoined northwardly on *Wilson's* first purchase, of which he had a conveyance, or on the half acre, of which he had no conveyance.

Wilson, after his bargain with *John Jefts*, occupied the half acre for two years, as he would occupy his own land, including the time when *Crosby's* deed was executed, but he did not claim the land and would have informed any enquir-

er that he had no title to it, but had contracted with *John Jefts* for one. In 1806, he applied to the owners, *Elizabeth* and *Alice Jefts* for a title, but they refusing to give him one, he abandoned the occupation. It further appears that *Crosby's* deed conveys to him his land, *with all the buildings* thereon, and if he is bounded on *Wilson's* first purchase, there will be only a barn on his land ; but if he is bounded by the half acre, there will be a house also included.

For the tenant it appears, that neither the grantors nor *Parker* had any knowledge that *John Jefts* had bargained with *Wilson* for the half acre : and as to the expression of "*all the buildings*," it was found that the grantors purchased all these parcels of *Solomon Pollard* by a deed conveying them with all the buildings thereon, when in fact there were no buildings thereon, they having been erected afterwards : and that all the land, towhich *Wilson* had any title on record, washis first purchase.

Upon considering this case, we are all of opinion that the verdict is right, because *Crosby* is bounded northwardly on *Wilson's* land, and *Wilson's* first purchase is all the land that he in fact owned ; and all the land, of which he had any title on record, by which the tenant could ascertain the boundaries, and all the land, which the grantors of *Crosby*, who were also the grantors of *Wilson*, could contemplate as *Wilson's* land. And if the first purchase of *Wilson* is not a boundary of *Crosby's* land, then there will be half an acre between *Crosby* and *Wilson*, the property of the grantors, not conveyed, and *Crosby's* northern boundary will be on other land of the grantors. As to the words "*and all the buildings thereon*," they are often inserted by unskilful scriveners, without any particular meaning ; and in fact have no legal operation. This unskilfulness appears in this case from *Pollard's* deed, in which they were introduced, when in fact no buildings were on the land.

Judgment according to the verdict.

Dana for the demandant.

Ward and *Jos. Locke* for the tenant.

NATHAN BRIDGE *versus* DAVID AUSTIN.

THIS was an action pending in the county of *Middlesex*. The declaration was "in a plea of the case for that the said "*David* at *Boston*, *viz.* at *Charlestown* aforesaid, on the "twenty-second day of October in the year of our Lord, "1805, in consideration that the plaintiff had made him the "said *David* his bailiff of one case of linens, of the value of "five hundred dollars, and had agreed to allow and pay him "a commission of five *per cent.* on the proceeds of the sale "thereof, promised the plaintiff to transport the same linen "to *Charleston* in the state of *South Carolina*, at his the "said *David's* own risk against all danger, excepting the "dangers of the seas, and dispose of the same to the plaint-"iff's best profit and advantage, and render to the plaintiff "his reasonable account thereof. Yet the said *David*, "though often requested, has never rendered his reasonable "account to the plaintiff touching the premises, or in any "wise paid him for said linen: to the damage," &c.

A supercargo engages to transport goods at his own risk against all dangers, excepting the dangers of the seas, and dispose of them to the best profit of the consignor, and render his reasonable account: the goods arrive in safety at the place of destination, and are there stolen out of a store where they were deposited for sale: He was held to account to the consignor for the value at the place of shipment, deducting the agreed commission.

Upon *non assumpsit* pleaded, the cause was tried, at the sittings after the last October term at *Cambridge*, before the *chief justice*, whose report was as follows.

"On the trial, the plaintiff, to maintain the issue on his part gave in evidence a *memorandum* in writing signed by the defendant in the words following—"Boston Oct. 22, 1805. *Received on board the ship* Rodney, J. Hurd, *bound for* Charleston, S. C. *a case of linens, amounting for the sterling cost to* 84*l.* 5*s.* 0½*d. which I promise to dispose of in* Charleston *for account of* Nathan Bridge, *and to account and pay to him the proceeds, and take on myself all risks, except those of the seas, for which I shall charge five per cent.* David Austin." And it was agreed by the parties that the said case of linens was transported by the defendant in the said ship to *Charleston*, where it arrived, and was delivered safe to him by the said *Hurd*.

The defendant to maintain the issue on his part, gave in evidence that after the case of linen was delivered to him in *Charleston*, he stored the same in a suitable and convenient store there for sale: that before the same was sold, it was stolen from the said store by some thieves to him unknown,

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without any fault on his part: that he has never been able to discover the said thieves, or to recover the said linens or any part of them; and that the customary commissions charged by commission merchants in *Charleston* for the sales of merchandize and making returns, is five *per cent.* on the proceeds.

On this evidence the plaintiff insisted that the defendant was not discharged by the said larceny. The defendant insisted that he was discharged, and if he was not, that he was entitled to another five *per cent.* besides that mentioned in the *memorandum.*

I told the parties that as the merits of the cause depended on the legal construction of the written *memorandum,* I would reserve that construction for the opinion of the whole court: and as there were no sales, I should direct the jury to find a verdict for the plaintiff, and to assess his damages equal to the value of the linens at *Boston* when shipped, deducting therefrom five *per cent.* commissions. They found a verdict agreeable to the directions: and the defendant, waiving his right to a review, moves for a new trial for the misdirection of the judge."

The cause was continued *nisi:* and now at this term the opinion of the court was delivered as follows by

PARSONS, C. J. We have considered the *memorandum* given in evidence, and are all satisfied that the construction of it is agreeable to the direction of the judge, and that the verdict cannot be set aside for his misdirection supposed by the defendant. Indeed the construction, for which the defendant contends, cannot be admitted; because it is repugnant not only to the express words, but to the manifest intent of the parties.

But in looking into the declaration, it clearly appears to us, that the written *memorandum* was not legal evidence to prove the plaintiff's count. The allegation is, that for five *per cent.* commission on the sales, the defendant promised to transport the goods to *Charleston, S. C.* at his own risk against all dangers, except of the seas. The risk of transportation, except of the seas, is the only risk the defendant is there alleged to take on himself, when from the *memorandum* he

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is liable to all risks, except of the seas until he account for the proceeds. The contracts are materially different: and as a judgment in this action would not be a bar to another action on the contract stated in the *memorandum*, the verdict must be set aside, and a new trial granted, when the plaintiff, if he should think proper, may move to amend on terms.

Ward for the plaintiff.

Bigelow for the defendant.

SIMON HUNT, PETITIONER FOR PARTITION,

versus

ABRAHAM HAPGOOD AND ANOTHER.

The judge of probate has no authority to settle lands assigned for dower, after the widow's term has expired, on one or more of the next of kin, to the exclusion of the others.

THE petitioner demanded one undivided ninth part of the described premises lying in *Acton*, in the county of *Middlesex*, the petition having been preferred to the court of common pleas in that county. On publick notice by order of that court, the respondents, *Abraham Hapgood* and *Ephraim Hapgood*, appeared and pleaded their several seizin of the described premises in bar of the partition, to which the petitioner put in a demurrer with reservation, and from the judgment, that partition be made, he appealed to to the supreme judicial court, holden in April, 1806. The cause stood continued until April term, 1807, when the parties agreed to submit the case to the determination of the court upon the following facts, *viz.* "That *Ephraim Hapgood*, father of the respondents, died seized in his demesne as of fee of certain real estate whereof the premises described in the petition were part, leaving eight children, his heirs at law: that upon his decease the said premises were assigned to *Rebecca*, his widow, as her dower in his estate: that she died September 16th, 1803, and the judge of probate for said county, by his decree made on the 10th day of April, 1804, assigned said premises to the respondents, being the eldest sons and two of the heirs, they paying to the other heirs respectively, or to their legal representatives, certain

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sums of money expressed in the said decree: That the petitioner, having a demand against *Joseph Hapgood*, one of said heirs, for money, due, purchased a writ in due form of law against said *Joseph*, and by force thereof, on the 18th of October, A. D. 1803, caused the premises to be attached as the estate of said *Joseph*, and at the court of common pleas on the Monday next preceding the third Tuesday in March, 1804, recovered judgment against the said *Joseph* in that suit, and on the 30th of the same March, sued out his execution upon the same judgment; and on the 20th of April next following, and within thirty days next after the rendition of said judgment, caused said execution to be levied upon one ninth part of said premises, as the property of said *Joseph*, and had the seizin and possession thereof delivered to him the said *Hunt*, the petitioner, in due form of law.

If upon the foregoing facts, the court should be of opinion that the said *Hunt*, by force of the proceedings aforesaid, took the share of the said *Joseph Hapgood*, in that part of the estate of his father *Ephraim*, which was assigned to the said *Rebecca* as her dower, and so is entitled to have partition of said premises according to his said petition, judgment to be rendered accordingly: But if the court should be of a different opinion, the petitioner was to become nonsuit, and the respondents recover judgment for their costs."

Upon this statement the principal question made at the bar was whether the judge of probate had authority to assign the lands in question, after the death of the dowager, to one or more of the heirs, in exclusion of the others. And this question was shortly spoken to by *Bigelow* for the petitioner, and *Dana* for the respondents, at the last October term at *Cambridge*.

The cause stood continued *nisi* for advisement, and now at this term the opinion of the court was delivered by

PARSONS, C. J. It appears from the case that the father of the respondents died seized of the premises, and of other lands, intestate, leaving the respondents, their brother *Joseph*, under whom the plaintiff claims, and five others, his children and heirs: that the premises were assigned to the widow as her dower; *Joseph* being seized of one ninth

part of the reversion : that the dowager died on the 16th of April, 1803 : that on the 18th of October following, the petitioner attached *Joseph's* interest in the premises in a suit, in which he recovered judgment at the March term of the common pleas in *Middlesex*, in 1804, and his execution upon that judgment was levied on *Joseph's* ninth part of the premises on the 20th of April then next. This is the petitioner's title.

The title of the respondents is under a settlement, made by the judge of probate, of all the premises on them, the two oldest sons of their intestate father, on paying to the other children, or their legal representatives or guardians their proportion in money of the value of the premises, as ascertained by an appraisement. The decree making this settlement passed April 10th, 1804, but no cause or reason is assigned by the judge for making the settlement.

The question submitted to the court is, whether this settlement by the judge shall defeat the petitioner's attachment and levy.

There are three provincial statutes on this subject; the 4 *Will.* and *Mar.* c. 2. the 6 *Geo.* c. 3. and the 23. *Geo.* 2. c. 6. The first of these statutes commonly called the statute of distributions, enacts that the real estate of every intestate, saving the widow's dower, shall descend to his children or next of kin, as his heirs : And the judge of probate is directed to make a division of the estate among them, according to the return of five freeholders, or the major part of them, under oath, by him appointed. There is then a proviso, that when the lands cannot be divided among all the children, without prejudice to, or spoiling the whole, the judge may settle the whole on the eldest son, he paying to the other children their proportion in money of the estate at an appraised value. Afterwards is a clause directing the widow's dower, at the expiration of her term, *to be alike divided* as aforesaid. And it is made a question by the parties to this process, whether this clause gives the judge power to settle the dower, after it is fallen, on the eldest son.

The second statute authorizes the judge, if the estate cannot be divided among all the children, but will accommodate more

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than one, to settle the estate on as many children as it will accommodate.

The last statute extends the power of settlement by the judge on one or more of the next of kin, when there are no children.

These statutes are revised by the statute of 1783. c. 36. in which all the provisions are in substance re-enacted ; except that the statute is silent as to any settlement or division of the dower, when the widows term shall expire. And in all these statutes the shares in money are to be paid or secured to the other children, or to those, to whom a share of the land descended.

The power of the judge to turn the share of the land descended to any heir into money at an appraised value, and to compel him to take security for the payment, ought not to be extended by construction beyond the manifest intent of the statute. The design of the act was to prevent an injury to all the heirs by a minute division of the lands, by which they would be worth little to any heir. This power is therefore vested in the judge, to be exercised presently after the decease of the intestate, when the situation of the heirs will not be materially altered from the state in which the intestate left them, and when they would not be delayed in the use of their property, whether real or personal, longer than is deemed necessary to ascertain the claims of the creditors to the estate. On this principle the money is ordered to be paid to the children or next of kin, and consequently to their executors or administrators, but not to any assignee in fact.

But the widow's term in her dower may not expire until after many years, when the state of the intestate's family may be wholly changed by death, or their interests in his estate, including the reversion of the dower, alienated for a valuable consideration. It is not therefore within the intent of the statute that the dower, when it falls, should be settled on the eldest son, on his paying the other children the value of their shares in money. Indeed it is not uncommon for all the children to have alienated their estate in the dower during the widow's life : and it may be added, that the clause in the statute of distributions, from which the power is supposed to be de-

rived, directs the dower, at the expiration of the widow's term, to be *divided as aforesaid*, which must mean a division among all the children before directed, and not a settlement on the eldest son, by which any division is excluded.

I am therefore satisfied that the judge has no authority to settle the dower, after the expiration of the widow's term, upon one or more of the sons or next of kin, to the exclusion of the others, and of those who may have purchased their estate therein.

There are some objections made to the form of the decree. It is not pretended that the judge could have made this settlement on the two respondents, if the estate could have been divided among all the children, without prejudice to or spoiling the whole, and this power is given to the judge only on this condition; and certainly it ought to have appeared on the face of the decree that the judge was exercising his power in a case to which it extended. But it is not stated in the case, that the lands would have accommodated more than two of the children; and it is not necessary now to determine whether the decree is void for this defect, or whether the remedy is by appeal.

I cannot but observe in this place, that in practice the power of the judge has been frequently improperly exercised by a misconstruction of the words "without prejudice to, or spoiling the whole." These words import a case when the shares divided, from the nature of the estate, would be worth but little, as in the case of a dwelling house, or some small parcel of land, the respective shares of which, holden in severalty, would be of much less value than when holden together. But the construction has in some cases been extended, with the design of making convenient farms for one or more of the children, uniting different and distinct parcels of land for this purpose, when a division among all the heirs would not have lessened in any degree the profits which were received from the whole together.

Another objection is that the lands are settled on two children jointly. This manner of settlement is new to me. If the lands must be holden jointly, they may as well be holden jointly by all the children as by two. It certainly has

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the appearance of contrivance to divest *Joseph* of his share, without settling the lands on any one of the sons, or without deciding that they are incapable of any division. The practice, as far as I have known it, has been to direct the commissioners to divide the lands into as many shares as can be done without prejudice to or spoiling the whole. The return contains this division by metes and bounds, or by some certain description, with the appraisement of each part. If there are as many shares as children or next of kin, each one has a share, accounting, for its appraised value. If there are not so many shares, the judge assigns as many shares, as are returned, to as many of the next of kin as will accept of them, proceeding according to the priority prescribed by the statute.

It is not however necessary to decide whether the decree is void for this irregularity, or must be corrected on appeal. For we are all of opinion that the judge has no authority to settle lands assigned for dower, after the widow's term has expired, on any one or more of the next of kin, to the exclusion of the others: that for this reason the decree is void, as the defect of power appears on the face of it; and cannot be cured by the allegation or proof of any facts whatever; and that the interlocutory judgment must be entered for the petitioner, *that partition be made.*

UPON THE PETITION OF SARAH BONNER AND OTHERS FOR PARTITION.

A petition for partition ought not to include lands lying in different counties.

THE petition prayed for partition of two several parcels of land, one of which was described as in the county of *Lincoln*, and the other in the county of *Kennebeck*.

It was observed *by the court* that it would be improper to proceed upon the petition. There may be issues of fact joined as to each of the tracts of land, which must be tried in the respective counties, wherein the land lies. There ought therefore to have been several petitions for the land in each county.

Such petitions were afterwards presented, and notice ordered returnable at the next terms of the court in *Lincoln* and *Kennebeck* respectively.

Heard for the petitioners.

THE INHABITANTS OF WINCHENDON, PLAINTIFFS IN ERROR,
versus
THE INHABITANTS OF HATFIELD.

THIS was a writ of error to the court of common pleas for the county of *Worcester*, brought pursuant to the provisions of the statute of 1793, c. 59, § 11. to reverse a judgment rendered by that court in December, 1806, respecting the settlement of a pauper, upon an appeal from the adjudication of a justice of the peace for the same county. The records of the court below, as certified by the presiding judge, was as follows:

"WORCESTER, *ss. Court of Common Pleas, December* 1806.

The town of *Winchendon*, in the county of *Worcester*, complainants against the town of *Hatfield*, in the county of *Hampshire*, before this court by appeal from the adjudication of the Hon. *Dwight Foster*, Esq. one of the justices of the peace for said county, setting forth in their complaint, that *Edom London*, a negro man, now resident in said town of *Winchendon*, is poor and become chargeable to said town, and that the said town of *Hatfield* is the place of his lawful settlement, and praying that it may be so adjudged.

The facts in the case, from the evidence before the court, are, that said *Edom*, in the year 1757, was the proper estate of one *Samuel Bond*, and then by him sold to *William Williams* of *Weston;* that some time in the year 1760, and after the decease of the said *Williams*, said *Edom* was set off as the estate of said *Williams* to the wife of *Oliver Partridge* of *Hatfield*, who was the daughter of said deceased, as part of her portion in said deceased's estate, and then went to live with said *Partridge*, in said town of *Hatfield*, and continued his servant until the 2d day of October, A. D. 1767, at which time he was sold by said *Partridge* to *John Ingersoll*, Esq. of *Westfield*, in said county of *Hampshire*, and continued with him about three years; was then sold by said *Ingersoll* to *John M'Cluster* of *Longmeadow*, lived with him a few weeks; was then sold by said *John M'Cluster* to *Joshua Holcomb*, of *Simsbury* in *Connecticut*, and lived with him about four years; then was sold by said *Hol-*

Before the revolution the settlement of a slave always followed that of his master.

Slaves were not within the statutes relating to the warning of persons in order to prevent their gaining a settlement; nor within the statute of 7. *Geo. c.* 3. which provides that no settlement shall be gained by residence.

But when manumitted, they could acquire a settlement in their own right, and if they had resided a year in the town where they where manumitted they could not then be warned out.

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comb to *William Bond*, of *Lincoln*, and lived with him a short time; was then sold by said *Bond* to *Thomas Cowdin*, of *Fitchburg*, and lived with him three or four years; was then sold by said *Cowdin* to *Jonathan Stimson*, of *Winchendon;* and the day following he absconded and enlisted in the eight months' service in *Cambridge*, and before the expiration of the said eight months' service, and in the year 1775, was sold by said *Stimson* to *Thomas Sawyer*, of *Winchendon*, with whom he lived sometime; then he was was sold by said *Sawyer* to *Daniel Goodridge*, of the same *Winchendon*, in the month of July, 1776, with whom he lived about five weeks; then he enlisted into the three years' service, and the said *Goodridge* received the whole of his bounty, and part of his wages."

The court of common pleas affirmed the judgment of the justice, and adjudged that the lawful settlement of the said *Edom London* was not in the town of *Hatfield*.

Upon the general issue pleaded of *in nullo est erratum* the cause was shortly spoken to at the last September term in *Worcester*, by *Upham* for the plaintiffs in error, and *F. Blake* for the defendants.

Upham relied on the pauper's residence in *Hatfield* more than a year prior to the year 1767, without being warned to depart pursuant to the laws then existing, whereby he gained a settlement in that town. Since the statute of 1767, no warning was necessary to prevent the acquiring a settlement, and the facts shew no settlement gained since the pauper left *Hatfield*. He is then yet settled there, unless his being a slave makes a difference in the case, of which *Upham* was not aware.

Blake argued that paupers must derive their settlement in any town, so as to be a legal charge on such town, by force of some statute, and he supposed the plaintiffs in error relied on the provincial statute of 4 *Will.* and *Mar.* c. 13. § 9. which gave a settlement to any person sojourning in any town by the space of three months, not having been duly warned to depart therefrom. But it was declared by the proviso to that section that it was not to be understood of certain descriptions of person, among which are enumerated "*persons lawfully restrained in any town.*" That this description appli-

ed to negroes holden in servitude, or that slavery was recognized during the provincial government, was very clear from the statutes of 2 *Anne*, c. 2. which required the master of "*mulatto or negro slaves*" to give bond to indemnify the town previous to their manumission: and this provision proves too that slaves, while they continued such, could gain no settlement. The statutes of 4 *Anne*, c. 6. imposing a duty on the importation of negroes, treats them as mere chattels.

The statute of 4 *W.* and *M.* authorizes the removal of persons duly warned, and not departing the town within a certain limited time. But it could never be the intention of the legislature that slaves should be taken from the service of their masters. It follows then that they gained no settlement under that statute.

The cause was continued *nisi*, and at this term *Bigelow*, of counsel for the plaintiffs in error, insisted that the exception in the statute of 4 *W.* and *M.* of "*persons lawfully re-*" *strained in any town*," did not apply to slaves, but was analogous to the description immediately preceding of persons committed to prison, and so applicable to persons committed to a work-house, or house of correction, and there restrained by lawful process. But if slaves were comprehended in the phrase, yet the succeeding provision that the persons receiving and entertaining any such persons "shall "be the *town's security*, &c." imply a burthen, to which the town was liable, which necessarily presumes that the persons referred to might acquire a legal settlement. Indeed to construe the proviso in the statute so as to exempt persons *lawfully restrained, &c.* from its operation, would make the act repugnant to itself; for it immediately proceeds to make a specific provision respecting such. The true construction then must be, that as to such persons, though they might acquire a settlement in the town by length of residence therein according to the prior clause, yet the town should have a claim for indemnity upon certain individuals.

In the statute of 13 *Geo.* 2, c. 1. there is a similar provision, wherein it is enacted, that individuals guilty of the neglect therein mentioned, shall be liable for the support of paupers in certain cases, and then follow these words, "and all such

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"charges" [*viz.* for the support of paupers] "are and ought "to be understood and accounted to have arisen to *the town* "by reason of such neglect." These words shew that such paupers might acquire a settlement by residence, and that it was the primary duty of the town to relieve them, and to call on the individual for re-imbursement.

If it were true that, because slaves could not be removed, they were therefore not liable to be warned, yet it will not follow, that by a fair construction of the statute of 4 *W.* and *M.* they would not gain a settlement by mere length of residence. For this would prove that they could not gain a settlement at all, which the defendants in error will no pretend.

But further, by the principal clause in the act relating to this subject, it is the length of residence which confers the settlement, and the matter of warning to depart is inserted by way of exception. If then by an inference drawn from a provision in a subsequent clause, the necessity of such warning be suspended in a particular case, it only takes away an exception, and in such case the settlement will be acquired, whether the resident is warned to depart or not.

The statute of 2 *Ann.* c. 2. cited on the other side required the security on the manumission of a slave to be given to the town where the slave dwelt, and not where the master had his settlement; which shews conclusively that the residence of the slave gave him a claim to relief.

As it cannot be denied that slaves could acquire a settlement by some means, so it is equally clear that this must generally have been done either by length of residence, or derivatively through their masters. But that they did not derive a settlement from their masters may be argued from the inconveniences following necessarily from such a doctrine. If such had been the law, any person lawfully settled in a town, with slender means of support, or even himself maintained by the town, might acquire a property in old, infirm, or diseased slaves, whose maintenance would immediately become a legal charge on the town, and this whether the master resided in the place of his legal settlement or not. The first knowledge which the town could have of the mischief, would be after it was too late to apply a remedy. A principle, which would have been

productive of so much mischief, ought not to be admitted, unless it was positively enforced by some statute. But no such statute is to be found, and a contrary principle seems necessarily implied by the statute of 2 *Ann.* before cited.

No judicial determination is known to the plaintiffs in error, that a master communicated his own settlement to his slave by the mere act of purchase or ownership: and it is not easy to conceive that such a principle should exist, without being often called into operation in the courts.

This pauper unquestionably acquired a settlement in *Hatfield* by residing there more than a year previous to the 10th of April, 1767. He never afterwards acquired a settlement elsewhere: not by residence, for the law in that respect was from that day repealed: not by driving one from his master, for the same statute expressly says that no town shall be obliged to be at charge for the relief and support of any person, unless such person have obtained the approbation of the town for dwelling there. So that even if it were admitted that a slave could by law have acquired his master's settlement derivatively before the passing of that act, it must be certain that he could not afterwards.

Having then a settlement in *Hatfield* in 1767, it must have continued until he acquired another; and no mode, applicable to the case of this pauper, having since existed, whereby he could acquire a new one, it follows that *Hatfield* was the place of his legal settlement at the time when the town of *Winchendon* incurred the expenses in his support, for the recovery of which the original suit was brought.

The court took time for advisement; and afterwards in this term their opinion was delivered as follows, by

PARSONS, C. J. Slavery was introduced into this country soon after its first settlement, and was tolerated until the ratification of the present constitution. The slave was the property of his master, subject to his orders and to reasonable correction for misbehaviour, was transferable like a chattel by gift or sale, and was assets in the hands of his executor or administrator. If the master was guilty of a cruel or unreasonable castigation of his slave, he was liable to be punished for the breach of the peace, and I believe the slave was al-

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lowed to demand sureties of the peace against a violent and barbarous master, which generally caused a sale to another master. And the issue of the female slave, according to the maxim of the civil law, was the property of her master. Under these regulations, the treatment of slaves was in general mild and humane, and they suffered hardships not greater than hired servants.

Slaves were sometimes permitted to enjoy some privileges as a *peculium*, with the profits of which they were enabled to purchase their manumission, and liberty was frequently granted to a faithful slave by the bounty of the master, sometimes in his life, but more commonly by his last will. Several negroes born in this country of imported slaves demanded their freedom of their masters by suit at law, and obtained it by a judgment of court. The defence of the master was faintly made, for such was the temper of the times, that a restless discontented slave was worth little; and when his freedom was obtained in a course of legal proceedings, the master was not holden for his future support, if he became poor.

But in the first action involving the right of the master, which came before the supreme judicial court after the establishment of the constitution, the judges declared that, by virtue of the first article of the declaration of rights, slavery in this state was no more. And afterwards in an action* by

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LITTLETON *vs.* TUTTLE.

* This was an action of *assumpsit* for 7*l.* money expended by the plaintiffs for the support and maintenance of *Jacob*, alias *Cato*, a negro and a pauper.

Upon the general issue pleaded, the following facts were proved to the jury. *Cato's* father, named *Scipio*, was reputed a negro slave when *Cato* was born, and, according to the then general usage and opinion, was the property of *Nathan Chase*, an inhabitant of *Littleton*. *Cato's* mother, named *Violet*, was a negro in the same reputed condition, and supposed to be the property of *Joseph Harwood*. *Scipio* and *Violet* were lawfully married, and had issue *Cato*, born in *Littleton*, January 18th 1773, and was then, in the general opinion a slave, the property of the said *Harwood*, as the owner of his mother. *Harwood*, on the 17th of February, 1779, sold him to the defendant, who retained him in his service until he was 21 years old. He being then a cripple, and unable to labour, the defendant delivered him to the overseers of the poor of *Littleton*, and left him with them, refusing to make any provision for him: whereupon the overseers expended the money in his maintenance, for which this action was brought.

The court stopped the defendant's counsel from replying, and *the chief justice* charged the jury, as the unanimous opinion of the court, that *Cato*, being born in this country, was born free; and that the defendant was not chargeable for his support after he was 21 years of age. And the jury found a verdict accordingly without going off the stand.

Sullivan (*attorney general*) for the plaintiffs.

Bigelow for the defendant.

the inhabitants of *Littleton*, brought to recover the expenses of maintaining a negro, against *Tuttle*, his former reputed master, tried in *Middlesex*, October term, 1796, the chief justice in directing the jury, stated as the unanimous opinion of the court, that a negro born in the state before the present constitution was born free, although born of a female slave. It is however very certain that the general practice and common usage had been opposed to this opinion.

From this brief view of the state and condition of a slave it is manifest that the master was obliged to support him, and was entitled to all his services. The slave therefore could not acquire a settlement in his own right. But he might through age or disease, become useless, when the property of a master who was a pauper. In this case his maintenance would devolve on some town, and some settlement must be assigned to him, to designate the town subject to the burthen. He had consequently a derivative settlement from his master, and whenever the master acquired a new settlement, it was accompanied by the settlement of the slave, who could not be separated from his master. In this respect the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them and they cannot be separated from him. Thus their settlement is derived from the husband and father.

A reasonable conclusion from these facts is that slaves were not within the ninth and tenth sections of the statute of 4 *W.* and *M* or the 12 and 13 *Will.* 3. c. 10. making the warning out of persons within the year necessary to prevent a settlement; nor within the statutes of 10 *Geo.* 2. c. 3. and 13 *Geo.* 2. c. 1. which direct every inhabitant of a town, receiving an inmate, boarder or tenant, to give notice to the selectmen: and that slaves are not within the fourth section of the statute of 7 *Geo.* 3. c. 3. which provides that no settlement shall be gained by residence, as that section extends only to persons who were competent to gain a settlement by residence, if not warned out.

To this construction it is objected that the statute of 2 *Ann.* c. 2. considers slaves as gaining a settlement by residence, be-

Winchendon *vs.* Hatfield, *in error.*

cause a master of a manumitted slave must indemnify the town where he lives. The language of this statute is adapted to the cases, which most frequently, if not always, happened. A practice was prevailing to manumit aged or infirm slaves, to relieve the master from the charge of supporting them. To prevent this practice, the act was passed. The design of it was, to hold the master answerable for the maintenance of the slave, if the manumission was without indemnity. As slaves were rarely if ever manumitted, until after a long course of service, probably it never happened that they acquired their liberty, until after a year's residence in the town in which they were manumitted. And when they became free, they might gain a settlement in their own right by a year's residence, unless warned. The town wherein they were manumitted, was the proper town to be indemnified, for there only could they acquire a settlement against the will of the inhabitants, as, having lived there a year, they could not be the subject of warning.

The law must now be applied to the facts stated The inhabitants of *Winchendon* allege that the pauper, *Edom London*, has his legal settlement in *Hatfield*.

It is stated that the pauper was once the slave of *Oliver Partridge*, living several years with him in *Hatfield*, where his master was settled. The pauper then acquired a derivative settlement in *Hatfield*. Afterwards his master *Partridge* sold him to *J. Ingersoll*, Esq. an inhabitant of, and settled in *Westfield*. There he lived several years with his new master; and there he lost his settlement in *Hatfield* by gaining a new derivative settlement in *Westfield*. As it is not stated that the pauper at any time afterwards, again lived in *Hatfield* either as a slave or freeman, it is unnecessary to pursue the case further. Having lost his settlement in *Hatfield* and not having regained a new settlement there, the defendants in error are not liable for his maintenance: and the *judgment must be affirmed with costs.*

THE INHABITANTS OF CHELSEA

versus

THE INHABITANTS OF MALDEN.

THIS was *assumpsit* for money expended in the support of *Jacob Breden*, alleged by the plaintiffs to be a pauper, and to have a legal settlement in *Malden*.

Upon the trial of the cause at the last November term in this county before *Parker, J.* a verdict was found for the plaintiffs subject to the opinion of the court upon the facts, as they should be reported by the judge.

There was regular evidence to entitle the plaintiffs to recover the sum found by the jury, provided the legal settlement of the pauper was in *Malden* so that the inhabitants of that town were chargeable with his maintenance: and whether they were so chargeable or not, is the question reserved for the opinion of the court upon the following facts, which appear from the judge's report of the case.

Jacob Breden, the pauper, was the son of *Joseph Breden*, whose deposition is in the case proving that he the deponent was the son of *Samuel Breden* which *Samuel* lived in *Malden*, in the year 1745, and before, at which time [1745] the witness was nine years of age; and that the said *Samuel* resided in said *Malden* until his death, which was in 1780. Previous to the year 1745, the said *Samuel* had removed from *Malden* with his family to *Chelsea* where he resided eighteen months, and then returned to *Malden*. After his return, *viz.* in the spring of 1745, the constable of *Malden* pursuant to an order from the selectmen, warned *Samuel Breden* and *Sarah* his wife to depart out of the town, and to take all their children with them. They did not remove according to the warning, but remained in *Malden*, where *Samuel Breden* occupied real estate, and paid taxes for it.

In December, 1759, the deponent went to work at *Lynn* for three months, but went home to his father's house in *Malden* of nights. In March, 1760, being then of age, he hired himself for a year to a Mr. *Cheever* of *Lynn*, at whose house he boarded and lodged. After the expiration of the year, he oc-

If a person, before the statute of 7 *Geo.* 3. c. 3. had been duly warned to depart from a town, so as to prevent his acquiring a settlement in such town, and after the warning removed from the town without an intention of returning, continuing absent long enough to gain a new settlement and afterwards came back and dwelt in the town he had been warned to leave, he must have been again warned within a year from his return, or he would have gained a settlement.

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casionally laboured at *Lynn*, but made *Malden* his home. In January, 1761, he was warned out of *Lynn*. In May, 1763 he married at *Lynn*, and in June, 1764, removed thither with his wife and one child, and resided there until April, 1770, when he removed to *Malden*, where he resided until February, 1807, when the deposition was taken. The pauper was born at *Malden* in 1782, and has resided there, until lately, when he came to *Chelsea*, in which town he has not gained a settlement.

If upon these facts the court should be of opinion that the legal settlement of *Jacob Breden*, the pauper, was in *Malden* at the time the expense accrued to the plaintiffs, which is the subject of this action, judgment to be rendered according to the verdict: otherwise the plaintiffs to become nonsuit, and the defendants to recover their costs.

The cause was briefly spoken to at this term by *Gray*, for the plaintiffs, and *Ward* for the defendants.

It being agreed that the settlemet of the pauper, wherever it should be found to be, was derived from his father, he not having himself gained a settlement in any place, *Gray* suggested several objections to the sufficiency of the warning to *Samuel Breden* to depart from *Malden* in 1745. But the principal question arose on the warning from *Lynn* in 1761, which *Gray* contended had an operation to prevent *Joseph Breden* from ever acquiring a settlement afterwards in that town. There was no necessity for a second warning upon his return in 1764. It was an intolerable burthen upon selectmen to keep a constant watch over the miserable hovels in which people of this description reside, to observe the going, and return of such birds of passage. The statute does not expressly require it, and the inconvenience suggested shews that such should not be the construction.

Ward insisted that *Joseph Breden* gained a settlement by his removing into *Lynn* in 1764, and tarrying there a year, without being warned to depart: and he contended that a warning was necessary as often as a person returned into a town, after an absence long enough to acquire a settlement elsewhere, as was the fact with respect to the pauper's father in this case.

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The court took time for advisement, and their opinion was afterwards delivered as follows, by

PARSONS, C. J. In this action a verdict was found for the plaintiffs, subject to the opinion of the court on the facts reported. The action was brought to recover of *Malden* the expenses of maintaining *Jacob Breden* a pauper, alleging that his settlement was in *Malden*. If his settlement is not in *Malden*, the verdict is to be set aside, and the plaintiffs are to become nonsuit.

It appears from the facts that the pauper has never gained a settlement in his own right, and that his settlement is derived from the settlement of his father *Joseph Breden*.

Setting out with the known principle, that any man, having a legal settlement in any town in the state, does not lose it, but by gaining a legal settlement in some other town in the state, let us from the facts determine the settlement of *Joseph Breden*, the father.

In March, 1760, being then of full age, and competent to gain a settlement in his own right, he left his father in *Malden*, and went to live in *Lynn*, and there dwelt a year, and thus gained a new settlement in *Lynn*, unless legally warned to leave that town within the year. After the expiration of the year he returned to *Malden*, and there lived until June, 1764, not having been warned to leave that town. In June 1764, he, with his wife, removed to *Lynn*, and there dwelt until long after the 10th of April, 1767, not having been warned to leave that town, after he thus removed. In this manner he gained a settlement in *Lynn*, unless the objection of the plaintiffs should prevail.

It is objected, that *Joseph Breden* lived at *Lynn* during a year commencing in March, 1760; that before the year he was duly warned to leave that town; that a return of the warning, with the other requisites of the statute, was made to the sessions; and that having been once duly warned, and a return having been legally made, he could never by any future residence in *Lynn*, gain a settlement there. The legality of this warning and return is denied by the defendants, but we do not think it necessary to decide this point.

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By the statutes of 4 *Will.* and *Mar.* c. 13 and 12 and 13 *Will.* 3. c. 4. considered together, it is provided that if any person come to sojourn or dwell in any town, and be there received and entertained by the space of twelve months, not having been warned by the constable, or other person whom the selectmen shall appoint for that service, to leave the place, and the name of such person, with the time of his abode there, and when such warning was given, returned into the court of Quarter Sessions, every such person shall be reputed an inhabitant of such town, and the proper charge of the same.

From this provision it appears to us, that when a man has come to sojourn and dwell in any town, and he has been warned, and a return has been duly made within the year, he cannot gain a settlement by continuing his residence there any length of time whatever; nor perhaps by returning after a temporary absence, too short to enable him to gain a settlement by residence elsewhere: for his domicil may be considered as remaining, and it may be reasonably supposed that he absented himself with the intention of returning. But if after the warning he remove from the town, without an intention of returning, continuing absent long enough to gain a new settlement by residence, and afterwards come back and dwell in the town he had been warned to leave, he must be again warned within the year, for he now also comes to sojourn and dwell there: and if he be not so warned, by living there a year he will gain a new settlement.

This distinction comports with the words of the statutes: for a man may come to sojourn and dwell in the same town, in which he formerly had his domicil: and it is consistent with the intent of the statute to give the town another option, whether it will or will not receive the sojourner as an inhabitant. When he first came, he might be without property, and when sick, chargeable to the town: but when he shall come into the town again, he may have a large estate, and may be a valuable acqusition to the town as an inhabitant.

Let us apply this rule to the facts reported. From March 1760, to March, 1761, the pauper lived as an hired man in *Lynn*. He then left the town and dwelt in *Malden* until June, 1764. Then, with a wife he had married the preced-

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ing May, he moved into *Lynn*, to live there. This we consider as going to sojourn and dwell in *Lynn* within the intent of the statute. There he abode until 1770, not having been warned to leave that town. He therefore gained a settlement in *Lynn*. It is not necessary further to trace the motions of the man: for the statute of 2 *Geo.* 3. c. 3. was then in force, by which no settlement could be gained by residence or birth. *Joseph Breden's* settlement has remained in *Lynn:* and his son *Jacob*, the pauper, born in 1782, having gained no settlement in his own right, has a derivative settlement in *Lynn* with his father.

The verdict must therefore be set aside, and the plaintiffs be called.

Plaintiffs nonsuit.

ABIGAIL WALLIS, EXECUTRIX,

versus

JONATHAN WALLIS.

If one for a valuable consideration bargain and sell land with warranty, to hold from the grantor's death, no action lies during the grantor's life to recover the consideration money paid; although an action on the covenant may lie after the death of the grantor, if a title to the land be not made to the grantee or his heirs.

THIS was an action pending in *Middlesex*, brought by the plaintiff's testator, *Jonathan Wallis*, jun. and upon his decease prosecuted by the plaintiff, executrix of his last will. The declaration was *assumpsit* for 400 dollars, money had and received to the use of the plaintiff.

At the last October term at *Cambridge*, the parties agreed to submit the cause to the court upon a statement of facts; purporting that on the 11th day of June, 1805, the defendant, by his deed of that date, for the consideration of four hundred dollars expressed in the deed, gave, granted, sold and conveyed one fourth part of certain lands described in the deed, to the original plaintiff (who was the defendant's son) his heirs and assigns; *to have and to hold after the death of the grantor;* and covenanted with the grantee that

If such bargain and sale be made by a father to a son, the law will presume a consideration of natural affection from the consanguinity of the parties, in addition to the valuable consideration expressed in the deed, and construe it a covenant of the grantor to stand seized to his own use during his life, and after his death to the use of the grantee.

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he, the grantor, was lawfully seized in fee of the premises, that they were free of all incumbrances, except the grantor's right to the free improvement of said lands and buildings during the term of his natural life, and that he would warrant and defend the same to the grantee, his heirs and assigns forever after the decease of him the grantor, to hold as aforesaid: that the defendant refused to permit the said testator to enter under said deed, and that the said testator never did enter the premises so supposed to be conveyed by force of said deed: and on the 1st day of December, 1806, brought this action to recover back the said sum of four hundred dollars, the consideration money paid, upon the ground that nothing passed by said deed.

If the court should be of opinion that the plaintiff can maintain this action, the defendant agreed to be defaulted: otherwise the plaintiff agreed to become nonsuit.

The cause was submitted upon this agreement without argument, and being continued *nisi*, the opinion of the court was now delivered by

PARSONS, C. J. We do not know any legal principles, on which this action can be supported. The money was not paid through mistake, being supposed to be due when it was not: it was not obtained by deceit, fraud, imposition, or oppression: nor was it paid upon an executory contract, which has happened to fail, or which has been, or might be lawfully disaffirmed by either party. The most that can be urged for the plaintiff is, that nothing passed by the deed, as it was intended to convey a freehold *in futuro:* but he voluntarily paid the money for such a conveyance, and took a covenant from the grantor, that after his death the grantee and his heirs should have the land; which covenant, at the grantor's death, may be broken, and the foundation of an action for damages, if a title to the land be not made to the grantee or his heirs.

But, fortunately for the grantee, he is mistaken in the construction of his deed. For, although it is true that by a common law conveyance a freehold cannot be conveyed *in futuro;* yet by a covenant to stand seized to uses, such conveyance can be effected. And every deed ought to be construed, if it be legally possible, so as to effect the intent of the parties.

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In this case, beside the valuable consideration expressed, a consideration of natural affection may be averred as consistent with it; for the consanguinity of the parties, though not mentioned in the deed, is agreed in the case. The intent of the parties is clear, and there is a covenant of the grantor, that after his death the grantee shall have the land. This conveyance is therefore to be considered in law, as a covenant by the grantor to stand seized of the land, to his own use during his life, and after his decease to the use of the grantee and his heirs. And upon the execution of the deed, the grantor was tenant for life, and a remainder in fee was vested in the grantee.

The plaintiff must be called.

☞ *Vide Milbourne & ux.* vs. *Assignees of Simpson.* 2 *Wils.* 22. *Roe ex dim. Wilkinson* vs. *Tranmer & al.* 2 *Wils.* 75,—*Shep. Touchstone* 82, 83. *Co. Litt.* 49, *a.*—1 *Sid.* 25,—2 *Vent.* 318.

Hastings and *Bigelow* for the plaintiff.

Dana for the defendant.

JOHN HILL AND WIFE

versus

JOSHUA DAVIS AND ELEAZAR DAVIS, EXECUTORS OF THE LAST WILL OF BENJAMIN DAVIS.

DEBT qui tam for not causing the will of the said *Benjamin* to be proved, or presenting the same to the judge of probate, with their refusal to accept the trust, within thirty days of the decease of the testator.

If two executors are named in a will, they knowing of their appointment and the will is not presented to the probate court within thirty days from the death of the testator, an action for the forfeiture incurred by

The action was pending in *Middlesex*. The writ was served on *Joshua Davis* only; who pleaded that he did not owe the plaintiffs any thing in manner and form as they had declared, and this issue being joined by the plaintiffs, a trial was had at the sittings after the last October term in *Cambridge*, before *the chief justice*.

statute of 1783, c. 24. § 16. may be sued against them jointly, or perhaps severally, although but one forfeiture can be recovered.

But if the neglect be in one of the executors only, he alone incurs the forfeiture, and is alone to be sued.

A man and his wife cannot recover in a popular action sued in their joint names.

Hill & ux. vs. Davis & al. Exrs.

Upon the trial the plaintiffs, to maintain the issue on their part, gave in evidence, that the testator died about ten years ago: that after his funeral the said *Joshua* produced a paper, which he said was the will of the said *Benjamin*; and the same was, at his request, read: that in the said will a legacy was bequeathed to the plaintiff's wife, and to sundry other persons; and the said *Joshua* and *Eleazar* were appointed executors. No evidence was given that the said will had ever been presented for probate, or lodged with the judge of probate by the executors or either of them; or that they, or either of them, had ever signified to the judge a refusal to accept the trust. And there was no evidence that the said *Eleazar* ever had any knowledge of the existence of the said will.

The *chief justice* directed the jury that upon this evidence, in this form of the action, they ought by law to find the issue for the defendants, because the plaintiffs had demanded a joint forfeiture of the said *Joshua* and *Eleazar* in an action of debt, and had not produced any evidence to shew that the said *Eleazar* had incurred any part of the forfeiture demanded. The jury found a verdict accordingly for the defendants. The plaintiffs moved for a new trial on account of the judge's direction, and the cause was continued *nisi*.

And now at this term *Ward* for the plaintiffs cited 1. *Bac. Abr. actions qui tam.* D. "Where several persons are jointly charged for an offence against a statute, which in its nature may be committed by a single person, without the concurrence of any other, some of them may be acquitted, and others found guilty." And that this doctrine applies to actions of debt *qui tam*, as well as to informations, he argued from the cases of *Wortley* vs. *Herpingham* (1), and *Coffin* vs. *Carter* (2), in which it was ruled that *not guilty* is a good plea to an action of debt on a penal statute.

As to the joining the plaintiff's wife in the writ, *Ward* said he did not commence the action; and if a new trial was granted, he should move for leave to strike her name out of the proceedings.

(1) *Cro. Eliz.* 766.
(2) 1 *Term R.* 462.

Hill & ux. vs. Davis & al. Exrs.

Bigelow, for the defendants, was stopped by the court, whose opinion was afterwards delivered by.

PARSONS, C. J. By the statute of 1783, c. 24, § 16. it is enacted that if any executor or executors of any will, knowing of their appointment, shall not within thirty days after the testator's decease, present the will to the probate court, every executor so neglecting his or her trust in that behalf, (without just excuse made and accepted by the judge of probate for such delay) shall for his or her neglect forfeit *five pounds* for each month he or she shall delay to present the will, to be recovered by action of debt, one moiety to the plaintiff, and the other moiety to the legatees.

This action was brought by the plaintiffs to recover this forfeiture against the defendants named as executors in the will, for their joint neglect. The writ was served only on *Joshua*, who pleaded that he did not owe the plaintiffs in manner and form as they had declared, and issue on this plea was joined to the country. On the trial there was no evidence that *Eleazar*, one of the executors who was sued, ever had any knowledge that the will existed. And the jury were directed that, for this defect in the plaintiff's evidence, he had failed to maintain the issue on his part. For this direction a new trial is moved for.

The object of the statute was to compel a seasonable presentation of the will to the probate court. If either executor presents the will, no forfeiture is incurred by the other: if both neglect, a joint forfeiture is incurred by both, which may be sued for jointly: and perhaps separately, although but one forfeiture can be recovered. But if the neglect be in one executor, and not in both, the negligent executor alone incurs the forfeiture, and is alone to be sued.

In this case the plaintiffs might have demanded a several forfeiture from *Joshua*, but they have demanded, in an action of debt, a joint forfeiture of both the executors; and the defendant by pleading, denies that he owes a forfeiture jointly with the other; and upon this evidence it is very clear that the issue was with him, for the other executor had incurred no forfeiture.

Hill & ux. vs. Davis & al. Exrs.

In *informations*, on penal statutes for forfeitures incurred by malfeasance, against several, charging them all with the malfeasance, on not guilty pleaded the jury may convict some of the whole or of part of the offence charged, and may acquit others. For the malfeasance in an information is several as well as joint, and each defendant incurs a forfeiture in proportion to his offence: and in such information judgment may be rendered against the defendants as trespassers (3). But this action is *ex contractu* (4), in which a joint forfeiture is demanded as a joint debt.

We observe here that the plaintiffs are man and wife, in whose joint names a popular action has not been heretofore sued. The wife can have no interest in the judgment jointly with her husband in this case, nor is his interest therein in her right, but the effect of his own suit. If the verdict had been for the plaintiffs, no principle of law at present occurs to us, on which they could have judgment.

The verdict is not set aside, but judgment must be entered according to it.

(3) *Lane*, 59.
(4) 3 *Black Comm.* 117.

MOSES COOLIDGE *versus* AMASA WILLIAMS.

Towns adjoining on, or extending across a navigable river, may own the soil of the flats, or even of the channel, if a grant has been obtained of the government: but the property in the fish and also in the tide waters is in the publick.

THIS was an action of the case brought in *Middlesex* pursuant to the private statute of 1797, c. 75. to recover treble the value of certain shad and alewives alleged to have been taken by the defendant within the limits of *Watertown*.

The statute gives a power to the inhabitants of *Watertown Weston* and *Waltham*, to regulate, by their agents, the times,

But by the common law here, towns may appropriate the fish, if not appropriated by the legislture: yet for taking the fish no one can lawfully go on the soil of another without leave. If no appropriation be made of the fish, any citizen may take them, so that he does not trespass upon the land of others. Where two towns adjoin a river, the citizens of each may take the fish swimming in the tide waters.

Private satutes, made for the benefit of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others; unless such construction result from express words, or from necessary implications.

places, and manner of taking those fish, within the limits of the said towns, and to sell the right of taking them. The third section enacts that "if any person, other than those to whom the said right shall be sold as aforesaid, shall take any fish, of the description aforesaid, such persons so offending shall forfeit and pay treble the value of such fish so taken, to be recovered in an action on the case, to the use of any person who may sue for the same."

Upon not guilty pleaded, the action was tried at *Cambridge*, October term, 1806, before *the chief justice*, and a verdict found for the plaintiff by consent of the parties, subject to the opinion of the court upon the following facts, *viz.*

"That the defendant caught, with a seine, shad and alewives to the value of the sum mentioned in the verdict, in *Charles river*, within the times mentioned in the plaintiff's declaration: that the place in said river, where the said fish were caught, lies where the said town of *Watertown* is on the north shore, and the town of *Cambridge* on the south shore: that the defendant put the said seine into the said river on the *Cambridge* side, and extended it across the river over the flats on the *Watertown* side, and then drew the seine on shore on the *Cambridge* side, with the said fish in it: that one witness testified, that it was reputed, that the limits of *Watertown*, at the said place, extended into the said river towards said *Cambridge*, to the middle point between high-water-mark on each shore: that the deepest water was on the side of the channel nearest the said *Watertown* shore, where the greater part of the fish swim: that further up the river, over against the said *Watertown* shore, lies *Newton* adjoining on the said river, or on the channel thereof: that still further up said river, *Watertown* lies on both sides thereof, and extends across it, in which place is a fishery for shad and alewives, commonly called the *Watertown fishery;* and in no other place, but the last mentioned, have the inhabitants of *Watertown* been accustomed to carry on the shad and alewive fishery: that higher up the said river, where the tide does not flow, lies the said town of *Waltham*, on each side thereof, and extending across the same, where is carried on the *Waltham*

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fishery: that still higher up, on the said town of *Weston*, on both sides of, and extending across the same, but the said town has no fishery within its limits: that the place, where the said fish were caught as aforesaid, is the most convenient place in said town of *Cambridge* for carrying on the shad and alewive fishery: that the seine fishery cannot be conveniently carried on in the same river, unless the seine be carried across the said river: And that the inhabitants of *Cambridge* have been accustomed to carry on the shad and alewive fishery at the place where the said *Williams* caught them, it being a convenient place for that purpose."

"If upon these facts the court shall be of opinion that the verdict ought to have been found for the plaintiff, judgment shall be rendered accordingly: but if otherwise, the said verdict shall be set aside, and a verdict shall be entered for the defendant, and judgment be rendered accordingly."

Tyler Bigelow for the plaintiff.
Samuel P. P. Fay for the defendant.

The action stood continued until the last October term at *Cambridge*, when it was briefly spoken to by the counsel, who signed the foregoing statement of facts.

Bigelow, jun. relied on the express words of the statute giving the penalty, as above cited, for the support of the action.

Fay, jun. for the defendant. At common law the fishery of every navigable river belongs to the king for the benefit of his subjects generally, and every man may fish therein of common right although it flow over the soil of another (1).

By statute of the colony of *Massachusetts Bay* passed in 1641, it is ordered, decreed and declared, that every inhabitant, who is an householder, shall have free fishing in any rivers so far as the sea ebbs and flows, within the precincts of the town where they dwell, unless the freemen of the same town, or the general court have otherwise appropriated them (2).

(1) 2 *Rol. Abr.* 170, *l.* 20.—*Davis's Rep.* 56. 149.—1 *Mod. Rep.* 105.—*Warren* vs. *Matthews.* 6 *Mod. Rep.* 73.—*Com. Dig. Praerogative, D.* 50.—*Carter & al.* vs. *Murcot & al.* 4 *Burr.* 2162.

(2) 2 *Mass. Gen. Statutes* 966.

The soil of all navigable rivers belongs to the publick, and not to the owners of the adjacent lands (3).

As to the words of the statute which were relied upon by the plaintiff, it was said that this statute was highly penal; and it is a rule of law that a penal statute must receive a strict construction. Every statute must be so construed, that no man who is innocent be punished or endamaged: and no statute shall be construed so as to be inconvenient or against reason (4).

The statute in this case inflicts the penalty demanded on such as shall take fish, otherwise than is therein authorized, "*within the towns aforesaid*," viz. *Watertown*, *Weston*, and *Waltham*. Now to bring this fact within these words, it should appear that the whole offence was committed within those towns, or some, or one of them. But the case expressly finds that these fish were drawn on shore in *Cambridge*. The case finds also that in another part of the river, where it adjoins *Watertown* on each side, is the *Watertown fishery*, which this statute was undoubtedly intended to protect, and which alone it does protect. If the inhabitants of *Cambridge* have a right, at common law, to take fish in the river adjoining their town, they must be considered to have, with such right, every thing necessary to its enjoyment. But if they cannot stretch their seines across the river, they lose completely all benefit to be derived from the right so secured to them.

In the case of *Simpson* vs. *Scales* (5), which was upon the construction of an act of parliament, the court say they must regard the intention and object of the legislature in making the law: and *Chambre*, *J.* well observes that "conclusions from acts of parliament against the rights either of the publick or of individuals ought not to be enforced by too strict an adherence to the letter."

The action being continued *nisi*, the opinion of the court was delivered at this term by

PARSONS, *C. J.* Who after shortly stating the nature of the action, the provisions of the statute on which it was

(3) *Rex.* vs. *Smith & al. Doug.* 441.—1 *Sid.* 148. See also lord *Hale's treatise De portubus maris, in Hargrave's Law tracts.*

(4) *Bac. Abr. Tit. Statute I.* 9. 10.

(5) 2 *Bos. & Pul.* 496.

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brought, and the terms of the agreement on which the verdict was found, proceeded as follows.

The defence relied upon is that the defendant took the fish in *Cambridge:* that he put in his seine from the *Cambridge* shore, and having extended it into the river, he drew it upon the same shore, and there took the fish: and that the fishery, thus carried on in *Cambridge*, is an accustomed fishery for the inhabitants of that town, in this place, and carried on in the accustomed manner.

The plaintiff insists that this fishery by the defendant is prohibited by the act, because *Watertown* is situate on the other side of the river opposite to this place, and the defendant extended his seine across the channel, and over the flats on the *Watertown* side.

The decision of the question must depend upon the construction of the statute. It is stated that higher up the river *Watertown* is situated on both sides of the river, where there is a convenient place for the shad and alewive fishery, and which is called the *Watertown fishery;* and that the inhabitants of that town have been accustomed to fish there, and in no other place.

Towns adjoining, or extending across a navigable river, may own the soil of the flats, and even of the channel, if a grant has been obtained from the government: but the property in the fish, and also of all tide-waters is in the publick. But it seems to be a part of the common law of the state, that the town may appropriate the fish, if not appropriated by the legislature: but for taking the fish no man could lawfully go on the soil of another without his leave. This rule of our common law probably originated from a declaration of *common liberties*, made by the general court of the colony of *Massachusetts Bay*, as early as in the year 1641, which was cited at the bar. If therefore no appropriation has been made of the fish, any citizen may take them, so that he does not trespass on the land of others. But any town adjoining any river may appropriate the fish taken within its limits, and that the town on the opposite side of the river may have the same right, the limits must not include the tide waters ebbing and flowing, but the shores on which the

fish are drawn and placed, when they may be said to be taken according to the intent of this privilege. If the fish, when caught swimming in the publick tide-waters, are to be considered as taken within the limits of any town before they are haled on shore, it will be difficult in many cases to define the interfering rights of towns situate on opposite banks: and when the channel is not granted, fish swimming there out of the limits of any town would not be subject to appropriation.

The power of appropriation only not meeting the wishes of many towns, acts have been passed authorizing them, not only to fix the times and manner of taking the fish, but also the places, and the disposition of them when taken; and to sell the exclusive right of fishing; and guarding this authority by pecuniary penalties. And the place of fishing is always understood to be that part of the shore used for employing seines and nets, or other engines, and for bringing the fish to land; and not any part of the tide-waters in which they were swimming.

Independently of the statute in question, the defendant, or any other, might have put his seine into the river from the *Cambridge* shore, and might have landed his fish, if he had committed no trespass on the land: and the inhabitants of that town might have appropriated the fish, and have secured to themselves a several fishery. But the plaintiff supposes that these privileges are restrained, or at least that the fish shall not be caught on the *Watertown* side of the river.

Private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication. But every part of this statute may have a reasonable effect without any such construction. The object of it was to enable the towns of *Watertown*, *Weston*, and *Waltham* to regulate their own rights then subsisting, and to secure to themselves the benefits arising from such regulation, and not to grant any new privileges. The two last towns lay on each side of the river, and a part of *Watertown* extended across it. *Watertown* had a fishery on its shores, where the people were accustomed to fish, and not at the place op-

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posite to the *Cambridge* fishery. The defendant was fishing on the *Cambridge* shore, where the people were accustomed to fish, and in the accustomed manner extending his seine across the river towards, but not upon the *Watertown* shore, and taking his fish on the *Cambridge* shore. This privilege of the defendant, it was not the intention of the statute to infringe. He may enjoy it consistently with all the provisions of the statute, giving them a reasonable construction.

It is therefore our opinion that the verdict be set aside, and a verdict of not guilty be entered, upon which the defendant must have judgment.

JAMES PRESCOTT *versus* ELIAKIM TUFTS AND OTHERS.

The treble damages given by the provincial act of 1 *Geo.* 2. c. 4. are to be sued for in an action of trespass.

When a count is struck out of a declaration by leave of the court, the declaration must afterwards be considered as if the count struck out had never been introduced.

THIS was an action of *trespass* pending in the county of *Middlesex*, and was tried before *the chief justice* at the sittings in *Cambridge* after the last October term.

The declaration originally contained two counts. The first was trespass at common law for pulling down an uninhabited house of the plaintiff's. In the second count for the same trespass, the plaintiff demanded treble damages on the provincial statute of 1 *Geo.* 2. c. 4.

After the evidence was given to the jury, but before the cause was committed to them, the plaintiff, by leave of the court, struck out his second count, the defendant objecting.

The jury found a verdict for the plaintiff upon the first count; and the defendant moved to arrest the judgment, because the plaintiff had joined two counts, which by law could not be joined: he contending that the treble damages could be recovered only by an action of *debt* upon the statute.

The action was continued *nisi* for the decision of this motion, and now the opinion of the court was delivered as follows by

PARSONS, C. J. The statute giving the treble damages originally demanded by the plaintiff in a second count, directs that they may be recovered after the same manner of

conviction, and by the same rules and methods, as are directed in the provincial statute of 12 *Geo.* c. 5. Looking into that statute, we find the manner of conviction there described is in cases where the defendant shall be charged *in trespass*. Trespass is therefore the proper action for recovering the treble damages here demanded, and the defendant's objection is unsupported.

It is holden in some cases, where there is a misjoinder of action, a verdict of a jury, finding the issue for the defendant on the count misjoined, will not cure the declaration, so that the plaintiff can have judgment on the count, on which a verdict is found for him. Whether this is now law, it is not necessary to determine: for we are satisfied that when a count is struck out of the declaration by leave of the court, the declaration must afterwards be considered as if the count struck out had never been introduced. Judgment cannot be arrested.

Bigelow for the plaintiff.

Dana for the defendants.

EBENEZER WHITE, ADMINISTRATOR CUM TESTAMENTO ANNEXO OF JAMES GRIMES, DECEASED, PLAINTIFF IN ERROR,

versus

THOMAS PALMER.

A letter of guardianship of a *non compos*, issued after the inquisition required by the statute, is *primâ facie* evidence that the ward was not of sound mind.

THIS was a writ of error brought in the county of *Middlesex* to reverse a judgment of the court of common pleas for that county rendered in June, 1805, in favour of the defendant in error against the plaintiff's testator.

The error assigned was that the said *Grimes*, at the time of the rendition of the said judgment was *non compos mentis*, and incapable of taking care of himself, and that the said *Ebenezer White* and *Samuel Hall* had, long before the *teste* of the writ upon which the said judgment was rendered, been duly and legally appointed guardians to him the said *Grimes*, and, from the time of their said appointment to the death of the said *Grimes*, continued to be his legal guar

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dians. Nevertheless the said *White* and *Hall*, or either of them had never any knowledge or privity of or in said suit or process, until after the rendition of said judgment.

The issue joined by the parties, *viz.* whether *James Grimes* was of sound mind on the Monday preceding the first Tuesday of June, 1805, the time when the court was holden, at which the judgment complained of was rendered, was tried before *the chief justice* at the sittings in *Cambridge* after the last October term; and the cause being continued *nisi* the chief justice reported the evidence at this term as follows.

"The plaintiff in error, to prove that the said *Grimes* was not of sound mind at the time mentioned, produced several witnesses, from whose testimony on oath it appeared that the said *Grimes* died about two months after the rendition of the said judgment, aged ninety-four years: that for about two years before his death he had been worn out with age, and had undertaken to transact no business whatever: that in disposing of any property, leasing his land, and in making any contracts, he called the assistance of his neighbours, by whose judgment he acted: and that his appearance was that of a man, who had lost his mind and become childish. One witness testified that within that time he was sued by the town of *Goshen* for the maintenance of a grandchild, and the witness told him he had a good defence, and endeavoured to persuade him to defend the suit, but he could not prevail; *Grimes* saying that he knew all about it, and that the town could recover nothing; and he suffered judgment against himself by default for one hundred and seventy dollars. But no particular act of childishness or insanity, unless resulting from the foregoing testimony, was proved."

"The plaintiff in error further offered in evidence a letter of guardianship, granted in due form of law by the judge of probate for the county of *Middlesex*, and dated one day before the defendant's action was commenced, appointing *Samuel Hall* and *Ebenezer White* guardians of the said *Grimes*, who had been legally determined by the said judge to be a person *non compos mentis* agreeably to the statute in such case provided: which letter was objected to as le-

gal evidence by the defendant in error: but I overruled the objection, and permitted it to be read to the jury."

"The defendant in error produced no evidence; and I left the cause to the jury, to find the said issue upon the whole of the evidence aforesaid, who found their verdict for the plaintiff in error. The defendant in error moved for a new trial, because I permitted the said letter of guardianship to be read in evidence to the jury."

Ward, in support of the motion for a new trial, argued that the letter of guardianship was not proper evidence to the jury of the fact in issue, but merely of the opinion of the judge of probate as to that fact. No opinion, however respectable, was evidence. The reading this paper to the jury was calculated to mislead them, by taking their attention from the substantial testimony, and probably produced the verdict that was found, the other evidence being incompetent to support the verdict.

The opinion of the court was afterwards delivered as follows by

PARSONS, C. J. By the statute of 1783, c. 38. the probate court, making the inquisition there required, is authorized to assign guardians to any person *non compos mentis*, and to empower them to take care of his person and estate, to improve and receive the profits of his lands, to recover by suit at law all debts due to him, and to pay all his debts out of his real or personal estate. This decree of the judge, so long as it remains in force unreversed, must be considered at least as *primâ facie* evidence, that the assignment of the guardians was rightly made, and that the ward was a person *non composmentis*. If it was not to have this effect, no person could be induced to take the humane but unpleasant office. If in every exercise of his power he must be called upon, not only to shew that he was in fact assigned a guardian, but also prove by other evidence that the judge had discreetly exercised his jurisdiction, he would be subject to very great and unnecessary vexations.

And no injury can result from considering the guardianship as established wisely, and for good cause. The ward, if sane, may have the assignment revoked upon appeal: and it can-

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not be inconvenient to creditors, to call on the guardian for the payment of their debts, to which he is made liable; nor injurious to them, if their demands are disputed, to have the interest of their debtor defended by a guardian. And it is immaterial to the debtors of the ward, whether they are sued by him or his guardian, if they do not seek some undue advantage.

We are therefore satisfied that the letter of guardianship was proper evidence to be left to the jury. There are some strong grounds, on which it may be inferred, that a letter of guardianship of any person adjudged to be *non compos*, so long as it is unrevoked or not annulled, is conclusive evidence of his insanity: but on this point we give no opinion.

The verdict cannot be set aside; and judgment must be rendered, that the former judgment be reversed, and that the plaintiff in error, in his capacity of administrator with the will annexed, be restored to all which the testator lost thereby, with costs of suit.

Bigelow for the plaintiff in error.

NEHEMIAH WYMAN *versus* MICHAEL BRIGDEN.

Lands specifically devised are liable to be levied upon by the creditors of the testator, equally with other lands, of which he died seized.

THIS was an action of *covenant broken* brought in the county of *Middlesex* upon a deed made by the defendant, conveying to the plaintiff certain tracts of land in *Charlestown*, with the usual covenants of warranty, &c.

The parties submitted the action to the determination of the court upon a statement of facts which were substantially as follows, *viz.* That the defendant made the deed declared

Lands of a deceased testator are liable to be taken in execution by a creditor, notwithstanding the executor, being residuary legatee, has given bond to pay the debts and legacies.

Lands of a deceased testator are liable to be taken in execution, although in the possession of an alienee of devisee.

The extent of an execution on lands gives the creditor an actual seizin of the lands.

If an execution against the estate of a deceased testator be levied on lands in possession of an alienee of a devisee, and within the year the land be redeemed by the alienee: in an action of covenant against the devisee, he will recover as damages the redemption money and interest.

on: that the late *Moses Gill*, Esq. died seized of the land described in the deed, and by his last will duly proved, &c. devised the same specifically to the defendant in fee: that *W. N. Boylstone*, having as administrator with the will annexed of *Thomas Boylstone* recovered a judgment against the estate of said *Gill* in the hands of his executor, for the sum of 106,176 dollars 66 cents, caused execution upon that judgment to be levied upon the said land, and received seizin and possession thereof from the sheriff in due form of law: that the plaintiff, at the expiration of a year from the said extent, (the defendant having neglected to redeem the said land) paid the said *Boylstone* the sum at which the said land was appraised and set off to him, and the interest thereof, amounting to the sum of 1800 dollars, whereupon the said *Boylstone* executed a release to the plaintiff of all the right which he the said *Boylstone* had acquired to the same land in virtue of said execution and extent: but the plaintiff has never been out of the actual possession of said land, nor evicted therefrom, unless the levy aforesaid amounts to an eviction: that the said *Gill* died seized and possessed of real estate sufficient to pay all his just debts, which he devised to *Moses Gill* his executor in general terms, and by way of residuary devise: that after the decease of the testator, the said executor gave bond with sureties to the judge of probate for the county of *Worcester*, conditioned to pay all the debts and legacies of said testator: that the said lands described in the defendant's deed, at the time when they were conveyed by the defendant to the plaintiff, were of the value of 800 dollars, and are now of the value of 3000 dollars.

If upon this statement the court should be of opinion that the plaintiff can maintain his action, the defendant to be defaulted, and the court to assess such damages as the plaintiff is by law entitled to recover: if the court should be of a different opinion, the plaintiff to discontinue his suit, and the defendant recover his costs.

The cause was shortly argued at the last October term at *Cambridge*, by *Ward* for the plaintiff, and *Bigelow* for the defendant.

Bigelow contended, 1. That a judgment creditor cannot by law levy his execution on land specifically devised, if

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there are other lands sufficient not so devised, as was the case here(1). The executor in this case could not have obtained license to sell this land thus specifically devised, until he had accounted for all the personal estate, and such of the real estate as was included in the residuary devise to himself.

2. The executor of Mr. *Gill's* will gave bond for the payment of the debts and legacies, pursuant to the 17th section of the statute of 1783, c. 24. by which means an abundant remedy is furnished to the creditors and legatees, and the remedy against the testator's lands is unnecessary and indeed nugatory: whence it may be well argued that the lien otherwise supposed to exist upon those lands is dissolved. But

3. It is conceived that a creditor cannot by law extend his execution on any lands, except such as the executor might have authority to sell, either by powers vested in him by the will, or derived from a license of court pursuant to the statute. It is very clear that the executor could never have authority under the will to sell this land, until he had exhausted all the estate given to himself by the residuary clause: nor could he have obtained a license from the court, as was before observed. The plaintiff being seized of this land by a *bonâ fide* purchase from a devisee, the lien upon it in favour of the creditors was by that transfer annulled and dissolved.

4. Unless a previous decision to the contrary had taken place, to which the court would adhere, *Bigelow* was inclined to argue that the levying of the execution upon this land did not of itself amount to an eviction. If it gave the creditor a right of entry, yet no such entry was ever made, and the case expressly states that the plaintiff has never been out of the actual possession of the land.

As the parties have submitted the assessment of the damages in this case to the decision of the court, the defendant suggests that the amount paid by the plaintiff to *Boylstone* constitutes the largest claim which the plaintiff can make. Perhaps the utmost the defendant ought to be held to pay, is the sum he received for the land with interest.

(1) *Clarke* vs. *Sewell*. 3 *Atk.* 96.—2 *Com. Dig. Tit. Chancery.* 3 *Y.* 18.

Ward. Every devise of land is specific, for even a residuary devise is of such particular and specific lands as the devisor shall die seized of (2). But if there was any distinction between the different manner of devising, yet our statutes have entirely abrogated such distinction. For by statute of 1783, c. 32, § 7. all the real estate of any testator however devised, or whether devised or not, is made liable to be levied upon, by a judgment creditor, for the debts of the testator. And by statute of 1783, c. 24, § 18. provision is made to compel a contribution from legatees, devisees and heirs, in case any real estate devised shall be so taken in execution by a creditor of the testator. If then the argument raised by the defendant from the devise to him being a specific one has no weight, the case of *Gore* vs. *Brazier* (3), is an authority as to the other points made in the defence. That decision was made with great deliberation, and dependent of its weight as an authority, it would be no easy task to answer the arguments adduced by the court in support of the several points decided.

The cause was continued *nisi*, and at this term the opinion of the court was delivered as follows by

PARSONS, C. J. [After reciting the facts]. On these facts the question arising is, whether the plaintiff was, or was not legally ousted by *Boylstone*, the judgment creditor.

The defendant, denying the ouster, has made several objections against the plaintiff's recovery.

First, that the devise of the lands conveyed were a specific devise, and were not liable for the payment of the testator's debts by the levy of a creditor, until all the lands given to the residuary legatee had been first applied: because until then the executor could not have obtained a license to sell them for the payment of the testator's debts.

It is our opinion that this objection cannot prevail. By the *seventh* section of the statute of 1783, c. 32. the real estate of any testator is liable to be taken in execution upon judgments recovered against executors for debts due from the testator. And by the *eighth* section of the same act,

(2) 7 *Wesey, jun.* 137.—*Roper*, 27.
(3) *Ante Vol.* 3, 523.

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any executor delaying or neglecting to pay the debts due from the testator, and thereby subjecting the testator's lands to be taken in execution, shall be deemed guilty of waste. And by the *eighteenth* section of the statute of 1783, c. 24. when real estate devised to any person shall be taken in execution for the payment of the testator's debts, the other legatees and devisees shall be held to contribute *pro ratâ*. From these provisions it is manifest that all the lands of the testator, as well as his chattels, are liable to be taken in execution for the payment of his debts, if not satisfied by the executor: and the judgment creditor may levy his execution on any of those lands at his election. If any devisee or his assigns are injured, the remedy is by action of waste against the executor, if he has been guilty of unfaithful administration; or by an action for contribution against the other legatees and devisees. The right of the creditor is the same, when the land taken in execution is devised by a particular description, or passes by general words to the residuary legatee. For in all cases a devise of lands is considered as a specific devise, whether it is devised by a special or a general description, to a particular devisee, or to the residuary legatee. *Vide 7 Ves. jun.* 137.

Another objection is that in this case the executor had given to the probate court a bond, with condition to pay the debts and legacies agreeably to the seventeenth section of the statute of 1783, c. 24. and that by force thereof the lien of the creditors on the testator's lands was discharged.

We do not think that this objection has any weight. This bond is given at the election of an executor, who is residuary legatee, for his benefit, to excuse himself from returning an inventory, and from settling an account: and not to discharge the lien of the creditors by substituting a new security. Whatever remedy a creditor may have on the bond, it is a cumulative remedy. This point was determined in the case of *Gore* vs. *Brazier*.

The third objection is, that at the time of the levy the plaintiff was seized under a conveyance by the defendant, and that the creditor's lien was taken away by a *bonâ fide* sale by the devisee.

We are satisfied that this objection ought not to prevail: otherwise the intention of the statutes, providing that the real estates of testators shall be liable for the payment of their debts, might be easily defeated. A creditor cannot recover judgment for his debt until the expiration of a year from the testator's death, during which time it would be easy for the devisees to alien all the estates devised to them; and it is not supposed that they are accountable for the proceeds of the sales either to the executor or creditors. But we do not mean to be understood as deciding that a creditor, by unreasonable neglect and delay in pursuing his remedy may not be deemed to waive his lien on the testator's real estate. In this case the remedy was promptly and seasonably pursued. This point was also adjudged in the case of *Gore* vs. *Brazier*.

The last objection is, that the plaintiff being seized and in possession when the levy was made, the levy did not give the judgment creditor an actual seizin, but only a right to be seized on a subsequent entry: and as the case does not state such a subsequent entry, the plaintiff has not yet been lawfully ousted.

It appears to us that this objection must have the same fate as the others. The statute of 1783, c. 57, § 2, & § 3. expressly provides that when lands are taken in execution, the officer shall deliver seizin and possession to the creditor, who shall be answerable for the nett profits to the debtor, if he shall redeem by paying the debt and interest within a year. And by the statute of 1788, c. 51. § 3. it is declared, that when lands shall be extended upon, to satisfy an execution recovered by an executor or administrator, for a debt due to the deceased, he shall stand seized of those lands for the use of the persons who were interested in the debt. It is therefore very clear, that when an execution is duly levied on lands liable by law to be extended upon in satisfaction of the execution, the judgment creditor is by virtue of the levy actually seized of those lands. This point was fully considered and settled, when the judgment debtor was the ter-tenant, in the case of *Langdon* vs. *Potter & al.* (4):

(4) *Ante Vol.* 3, 215.

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and when the alienee of the devisee was the ter-tenant, which is the present case, in the often cited case of *Gore* vs. *Brazier.*

The parties having agreed that at this time the land is worth 3000 dollars, that it was in fact appraised to the judgment creditor at a much less sum, and that the plaintiff defeated the levy by paying within the year the appraisement with the interest, the defendant has argued, that in this case the value of the land at the time of the ouster is not the measure of damages, but that the sum paid to the plaintiff to release the same, with interest, is all that he can legally claim. And we think that the defendant is right. The plaintiff, by virtue of the defendant's deed to him, not only derived from the defendant all his estate in the land, but also an equitable right to redeem it, if it should be taken to pay the testator's debts. This equitable right thus obtained he exercised to defeat the levy, and what benefits he received by it must accrue to the defendant, from whom it was derived. The plaintiff cannot therefore be considered as now in possession under a new title, but as under his former title, having removed an incumbrance on it. For the necessary expenses he incurred in extinguishing the incumbrance, he is entitled to demand a reimbursement from the defendant. The redemption paid by the plaintiff, with interest from the time of payment to the time of the judgment, forms the amount of the damages the plaintiff can recover.

Let the defendant be called, and judgment be rendered for the plaintiff.

ASAPH CHURCHILL *versus* HENRY SUTER.

Endorsers of a negotiable security are incompetent witnesses to prove it usurious.

ASSUMPSIT by the endorsee of a negotiable promissory note against the promiser. The action was submitted to the opinion of the court upon the following state of facts.

"On the tenth of July, 1807, the defendant made a note promising one *Charles Copeland* to pay him or his order 275 dollars in sixty days with grace, which *Copeland* endorsed

in blank; and which, to raise money, they delivered to one *Bartlett* a broker, to negotiate in the market, who also endorsed it in blank, and sold it to the plaintiff. It is agreed by the parties, that if said endorsers are incompetent witnesses to prove an usurious consideration, then judgment is to be rendered for the plaintiff, with costs."

"But if said endorsers are considered by the court as competent witnesses to prove to a jury an usurious consideration, it is agreed that they would testify that the note was made and committed to *Bartlett* as aforesaid, who endorsed it as aforesaid: that said *Bartlett* thereupon applied to the plaintiff, offered the note, and asked him how much he would give for it: that the plaintiff replied, ninety four per cent.; which was accepted: that said *Bartlett* did not inform the plaintiff that the note was originally made to sell in the market: that nothing was said concerning any rate of interest whatever: but that the whole bargain consisted in a simple offer and acceptance of ninety four per cent. for the note: that all the persons, whose names are upon the note, were then of doubtful credit, and failed before the note arrived at maturity."

"If it shall be the opinion of the court, that the preceding facts constitute such an usurious consideration, as to vacate the note, the plaintiff is to become nonsuit, otherwise he is to recover judgment as above."

When the cause came on for argument, the court called on the defendant's counsel to shew that these witnesses are competent to shew the note void for usury.

Selfridge for the defendant contended that by law every person, not convicted of an infamous crime, is a competent witness in any cause, in the event of which he is not interested: and he relied on the case of *Jordaine* vs. *Lashbrooke & al.* (1), as expressly in point. The case of *Bent* vs. *Baker & al. in error* (2), contains a decision similar in principle.

The great inroad made by our statute of 1783, c. 55. upon the common law, as to its rules of evidence, by admitting the party to an usurious contract to his own oath in discharge of himself from the obligation of such contract, shews the strong

(1) 7 *Term R.* 601.
(2) 3 *Term R.* 27.

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disposition of the legislature to prevent and punish usury: and will naturally incline the court to give the most liberal extension to the views of the government, thus plainly expressed.

As to the 2d point made in the case, *viz*, whether the facts disclose an usurious contract, the statute before referred to declares that all contracts and assurances whatsoever, on which there has been, directly or indirectly, reserved or taken above the rate of six *per centum per annum*, shall be utterly void. In this case the broker was the agent of the maker of the note, and the corrupt transaction was therefore directly between the parties, on the maxim, *qui facit per alium, facit per se*. And there cannot exist a doubt that this would have been usury if *Suter* had sold this note himself to the plaintiff. If the wholesome provisions of the act can be evaded by the artifice practised in this case, it may as well be expunged from the statute book(3).

Churchill cited the case of *Walton* vs. *Shelley*(4), and he argued that the principle of that decision being common law at the time the constitution of the state was framed, and the constitution having adopted the common law generally as it then existed, except so far as the same should be altered by the legislature, this court was bound by that decision however its principles may have been since controverted in the courts of *Westminster Hall*. Added to which, the general practise of our own courts has conformed to the principle established in that case, and an uniform practise is not to be shaken on light grounds.

To admit this kind of testimony is to throw out a lure to perjury. Most of the money transactions in the state are conducted in the manner stated in this case. The uniform practise of the banks in discounting bills and notes would be overthrown and the most mischievous effects would follow, if this testimony should be admitted to set aside a contract thus fairly made.

The case of *Jordaine* vs. *Lashbrooke & al.* turned wholly on the hazard to which the revenue would be exposed, unless the evidence was admitted.

(3) *Lloyd qui tam* vs. *Williams*, 3 *Wils.* 250.—*Massa.* vs. *Darling*. 2 *Str.* 1243.

(4) *Term R.* 296.

In the case of *Hart* vs. *M'Intosh*(5) *Buller, J.* adhered to the rule laid down in *Walton* vs. *Shelley*, and rejected the testimony of a witness produced to defeat a security, to which he had given credit by his endorsement.

The court took time for advisement, and their opinion was afterwards delivered as follows by

PARSONS, C. J. This is an action of the case on a promissory note, sued by the endorsee against the promiser.

The parties have stated a case, and have submitted to the court to enter judgment according to the law resulting from the facts thus disclosed.

The defence is usury, and two questions are made for the decision of the court, *viz.* 1. Whether in this action the endorsers are competent witnesses to prove the contract usurious: and 2. If they are, whether from the facts disclosed by their testimony the contract is usurious.

As to the first question, the defendant has argued that the endorsers are competent witnesses; because they are not interested in the event of the suit, and have not been sentenced for any infamous crime.

The plaintiff admits the general rule advanced by the defendant; but he has argued that there are exceptions to that rule, and among them it is one, that the parties to a negotiable security shall not be admitted as witnesses to prove the security originally void.

Let us consider this question as supported by the authority of adjudged cases. The first case, in which it is determined that witnesses of this description, and for this purpose, should be admitted is *Jordaine* vs. *Lashbrooke & al.* In that case the endorsee held a bill of exchange unstamped, purporting to be a foreign bill not liable to the stamp duties. The drawer was admitted to prove that the bill was in fact drawn in *London*, but was dated abroad to defraud the publick revenue of the nation.

Before that case we find no report, where the question was decided, until the case of *Walton* vs. *Shelley*. There the parties to the negotiable security were not admitted to prove it usurious, because it was a rule, that no man should

(5) 1 *Esp. Rep.* 298.

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be allowed to defeat, by his testimony, a security, to which he had given credit as a party. And this rule was supported by a maxim of the civil law prohibiting every man from alleging his own turpitude. In this case the counsel for admitting the witness agreed to the rule, and endeavoured to shew the case not within it. In *Bent* vs. *Baker* this principle is recognized by lord *Kenyon*, if the reporter was not mistaken, and certainly by judge *Buller*, who confined it to negotiable securities. But in the case of *Jordaine* vs. *Lashbrooke & al.* lord *Kenyon* denies that he recognizes this principle. If *Peake's* reports are worthy of credit, and I have never heard their authority questioned, lord *Kenyon* certainly recognized this principle in the cases of *Charrington* vs. *Milner*(6) and *Humphrey* vs. *Moxon*(7), and in *Phetheon* vs. *Whitmore*(8) the same principle is admitted by *Buller, J.*

In *Adams* vs. *Langard & al.*,(9) involving the same question afterwards decided differently in *Jordaine* vs. *Lashbrooke & al.* lord *Kenyon* admitted the drawer to prove the bill to be drawn in *London*, and for this cause a new trial was granted, but against his opinion. In *Rich & al.* vs. *Topping*(10) lord *Kenyon* persevered in his opinion, and admitted the drawer to prove the note usurious; and afterwards in *Jordaine* vs. *Lashbrooke & al.* two other judges concurred with him, but *Ashurst, J.* adhered to the former rule. And it appears from the case of *Hart* vs. *M'Intosh*, cited by the plaintiff, that the common pleas then adhered to the rule laid down in *Walton* vs. *Shelley*.

From this short review of the adjudged cases, no conclusion, on either side, can with certainty be drawn. When we revert to the decisions of this court, the practise has been uniform. More than twenty years ago, after a full argument, the court unanimously decided that the testimony of the parties to the note should not be admitted; and the decision has been uniformly adhered to. In this court therefore there has been no diversity of practise: and if we

(6) *Peake's N. P.* 6.
(7) *Ibid* 52.
(8) *Ibid* 40.
(9) *Ibid* 117.
(10) 1 *Esp. Rep.* 176

admit the endorsers in this case, we must overturn a series of our own decisions.

Let us now examine the question upon the principles, which relate to publick convenience and to private morals.

It need not be remarked, that when the consideration of a negotiable security is against law, yet on that account the security cannot, by the common law, be avoided in the hands of a *bonâ fide* purchaser not privy to the illegality of the consideration. But by statute usurious and gaming notes are made void, when holden by an innocent purchaser for valuable consideration. We therefore consider the question as applying generally to notes of this last description; because notes of the former kind, by being negotiated to any person ignorant, or who cannot be proved conusant of the original transaction, exclude the application of the rule in question.

The circulation of negotiable paper is extremely useful to trade, as it multiplies commercial credit, and the notes pass from man to man as cash. Any rule of law, tending unnecessarily to repress this circulation, is therefore against publick policy. When a negotiable note is offered to a merchant or farmer, in payment of his merchandize or produce, all he can look to are the names of the parties to the note, and all his enquiry is as to their solidity. Whether there be any secret canker, which will destroy the note, is unknown to him; and the parties are interested to conceal it, until he has given the note his confidence. And he may fairly presume that all, who have given the note a currency by their signatures, are honest men, and have not combined to defraud him. If therefore the parties to the usury or the gambling having received the fruits of their illegal contract, and having given a circulation to the note, can be admitted by their testimony to destroy it; beside the injury to a fair purchaser, the negotiation of paper will be greatly checked, to the no small injury of the publick.

But further considerations arise, if we regard the immoral tendency of admitting these parties as witnesses. As the law abhors fraud, its rules of proceeding are framed so as to prevent fraud, by detecting and punishing it. No man shall be admitted to allege his own turpitude, when the allegation will

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tend to encourage or support fraud or illegality. Thus in civil causes, the plaintiff shall not be permitted to shew any illegality in his own conduct, to maintain his action: neither shall the defendant, in his defence, allege his own wrong. In civil or criminal suits, persons may be witnesses against their accomplices, because their testimony tends to suppress fraud and injustice: and for the same reason witnesses, whether subscribing witnesses or others, may disclose a fraud.

But in the present case, to admit the parties to the illegal contract as witnesses, would not tend to suppress frand, but to encourage it, by enabling the parties to it to enjoy all the beneficial fruits of it, and to throw the mischievous consequences on an innocent endorsee. For any man, by contrivance with another, may take up money of him at usurious interest, and give him a negotiable note for security. The promisee may sell it for a valuable consideration, and when the endorsee attempts to recover his money, the promisor and endorser may, (at least by release) be witnesses for each other, and defeat the purchaser of his remedy, and quietly enjoy the money he has paid for the note.

We admit, as a general rule, that infamy and interest are the tests of the competency of witnesses. But to this rule exceptions are allowed. To preserve domestic harmony, and to secure to husband and wife an unrestrained confidence, neither is, in any case, admitted as a witness for or against the other. Also it is well known that interested witnesses are sometimes admitted on principles of convenience. A man robbed may be a witness in an action against the hundred for the robbery. And we are satisfied that the exclusion of parties to a negotiable security, from testifying that it was originally void, is another exception, established to assist commerce and to discourage fraud. We are therefore of opinion that the endorsers are incompetent witnesses in this case.

It is now unnecessary to decide the second question. A note may be sold at a greater discount than the legal interest, without being usurious. This generally happens when the holder doubts the solidity of the parties holden to pay; and therefore sells it, without his own guaranty, at a greater than the legal discount, on account of the hazard. In the case

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before the court the plaintiff took the guaranty of all persons, who ever had any interest in the note, and even of the broker. If a sale under these circumstances is not to be considered as usurious, it is not easy to conceive what sale is within the statute.

The defendant must either confess judgment, or be called.

☞ *Sedgwick, J.* not having been present at the argument, gave no opinion.

COMMONWEALTH *versus* WILLIAM CLAP.

THE defendant was indicted for making and publishing the following malicious libel against one *Caleb Hayward*, an auctioneer, and posting it up in several publick places in *State-Street*, in *Boston*, *viz.* "*Caleb Hayward* is a liar, a "scoundrel, a cheat and a swindler. Don't pull this down."

Upon the trial at the last November term before *Parker, J.* the counsel for the defendant insisted upon their right to prove the truth of the matters charged in the libel, and stated that, if permitted, they could prove that, in a course of dealing between the defendant and *Hayward*, the latter had defrauded the former; and particularly that upon a reference of certain disputes between them, *Hayward* had, by means of misrepresentations, and suppressing evidence, recovered a much larger sum against the defendant, than he, *Hayward*, knew to be due; and further, that in his dealings with other people, *Hayward* had in many instances acted unfairly. The motion was overruled by the judge, and the defendant, being found guilty, moved for a new trial, because evidence to the foregoing effect was rejected.

This motion came on now to be argued by *Bidwell, attorney general*, and *Davis, solicitor general*, for the commonwealth, and *Otis* and *Selfridge* for the defendant.

The truth of the words is no justification in a criminal prosecution for a libel.

But the defendant may shew the purpose of the publication to have been justifiable, after which he may give its truth in evidence, to negative the malice and intent to defame.

Publications of the truth concerning the character of a publick elective officer, and relating to his qualifications for such office, made with intent to inform the people, are not a libel. And every one holding such

an office may be considered as a candidate for re-election, if he does not disclaim it.

For the same reason the publication of falsehood and calumny against publick officers and candidates is a very high offence.

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Selfridge contended that the jury were not to be confined to the mere fact of publication, but ought to enquire into the truth of the words charged, and the intent with which they were published. To publish the truth from good motives, and for justifiable ends, whether it bears on the government at large, on particular magistrates or publick officers, or on private citizens cannot be libellous. To constitute a libel at common law, the charge must be both false in itself, and maliciously published. The ancient *English* statutes relative to this subject follow this principle. Thus the statute of *Westminster* 1. c. 34. commands "that none be so hardy to tell or publish any *false* news or tales," &c. To the same effect is statute 5. *Ric.* 2. c 5. These two statutes were in substance re-enacted in 1 and 2. *Ph.* and *M.* c. 3. And they were all in affirmance of the common law as it is laid down in the authorties cited in the margin (1). In the case of *the seven bishops*(2), *Powell J.* said, "to make it a libel, it must be *false*, it must be malicious, and it must tend to sedition." In the case of *Lake* vs. *Hatton*(3), *Coke* said "that if it had been true, that the countess of *Exeter* had a purpose to poison, &c. *Hatton* might have justified the writing."

It will appear upon examination of the cases which contradict this position, that the opposite doctrine originated in the starchamber court; and it was there the opinion was first advanced "that a libeller is punishable, although the matter of the libel be true"(4).

In the case of *The king* vs. *Haswell* and *Bate*(5), it is agreed, as a general rule, that the king's bench never grant an information for a libel, without an affidavit specifically denying the particular charges contained in the libel, and declaring them false.

If later decisions in the courts of *Westminster Hall* have a different aspect, the court will go behind them, and draw the common law from more ancient and purer sources.

(1) 3 *Inst.* 174.—5 *Rep.* 125.—9 *Rep.* 59.—2 *Inst.* 226, 227.
(2) 4 *State Trials*, 394.
(3) *Hob.* 252.
(4) *Moore.* 627.
(5) *Doug.* 387.

Otis considered that the common law, if it were opposed to the claim of the defendant in this case, was virtually repealed by the provisions of the constitution of this commonwealth: and he went much at large into the consideration of the right of the citizens of a free elective republick to speak and publish the truth respecting the characters of men in office, and of candidates for office. *Hayward*, as an auctioneer, is an officer appointed by publick authority. The community have an interest in his integrity, and have a right to be informed what his conduct in office is, that they may judge whether it be safe and discreet to entrust their property to his care and management. It is of much greater importance that this high constitutional privilege be preserved unimpaired, than that a libeller should now and then go unpunished.

In a civil action for a libel, the truth of the writing complained of is always received as a good and sufficient defence: and is there any foundation in good sense for a distinction between a justification in a civil action, and an excuse in a criminal prosecution?

The solicitor general thought the point too well settled to call for argument on the part of the counsel for the government. He said he had never known a decision that the truth might be given in evidence, even where the libel charged was concerning a publick officer and reflected on his official conduct. He acknowledged that whenever he had had the direction of prosecutions of this kind, he had always yielded to such a defence without opposition: and upon the trial of the indictment in *Essex* against the Printer of the *Salem* Register for a most malignant libel against Mr. *Pickering*, so confident was he of the purity and integrity of that gentleman's character, that he even courted the defendant to attempt a defence of this kind.

The constitution of the commonwealth secures to the citizens the benefit of the common law, as then known and acknowledged. What was the common law, as to the question now before the court, cannot be better expressed than in the words of *Blackstone*(6). "It is immaterial with respect to

(6) 4 *Comm.* 150.

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" the essence of a libel, whether the matter of it be true or " false, since the provocation, and not the falsity, is the " thing to be punished criminally: though, doubtless, the " falsehood of it may aggravate its guilt, and enhance its " punishment"(7). In *Franklin's* trial(8) lord *Raymond* " says, the injury is the same to the persons scandalized, " whether the letter was inserted out of malice or not: be- " sides, there is no knowing or proving particular malice, " otherwise than from the act itself."

The attorney general had not expected to hear the common law questioned as to this point. The very definition of libels, *viz.* " malicious defamations of any person, and espe- " cially a magistrate, made publick by either printing, writ- " ing, signs or pictures, in order to provoke him to wrath, or " expose him to publick hatred, contempt and ridicule," shews that its guilt consists not in the private injury to the person scandalized, but in its tendency to promote quarrels and a breach of the peace. The decisions of the courts in *England* for a long time past have been uniform upon this point, and it is therefore useless and futile to look for more ancient authorities, which cannot have weight at the present day.

It is a sufficient answer to the case cited from *Douglas*, that an information is always at the suit of an individual, and as it is considered as a means of satisfying the just resentment of the party injured, it is never granted, without a previous rule to shew cause which is always founded on an affidavit; whereas an indictment is at the suit of the government, and is always intended to procure the punishment of an offender against the publick peace. But in a later case than that in *Douglas* it was decided that in an information for a libel, it is not necessary that the libel should be alleged to be *false*, and for this sufficient reason, which was given by the court, *viz. because it is not necessary to prove the libel to be false*(9).

No particular decision of the courts here, adopting the common law upon this point before the framing of the state

(7) 1 *Hawk. P. C. ch.* 73. § 6.—*5 Rep.* 125. *Hob.* 253.—*Moore.* 627.—*Strange.* 498.—11 *Mod.* 99.
(8) 9 *State Trials*, 275.
(9) *Rex.* vs. *Burke.* 7 *Term R.* 4.

constitution, is recollected: but it is the constant practise of the court in their charges to the grand juries, to mention libels as a proper subject for their enquiry: and as there is no statute animadverting on this species of offence, it must be in virtue of the common law that they are so charged. If the crime exists only by common law, it must be considered as existing with all the rules and circumstances, which the common law annexes to it.

As to publick men, the measures of government, and candidates for publick offices, *the attorney general* said he had always held the people to be their proper and constitutional judges: and he never should while he held his present office oppose the giving of the truth in evidence to justify any publications charged as libellous in relation to those objects. But the same reason does not apply to libels on private persons, and it is a sound maxim that where the reason of the law ceases, the law itself should cease also. And he could not consider an auctioneer as a publick officer to whom the exception could at all apply. The word was used in the indictment only as a name of trade or mystery, and not of office. But if the word implies a publick office yet the libel in this case had no relation to that office. The words are mere general terms of reproach and scurrility, irritating indeed in the highest degree, but relating only to the private dealings and character of the individual. In a civil action by the party injured, it could never be allowed to justify such language as this by shewing its truth.

Otis in reply. The counsel for the prosecution have agreed that the doctrines of the common law cannot prevail here in their full extent. Publick officers and candidates are to be excepted while at common law a libel on these is considered as doubly heinous. But what publick officers are intended? Must they be legislative, judicial or executive officers? or does the expression extend to municipal and parochial officers, as selectmen, assessors, &c.

Further, who shall be considered as a candidate for a publick office? He who is nominated by a fellow citizen? if so, nothing more is necessary than for the party to propose a person for an office, and then his character becomes fair game. In

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some sense every citizen may be considered as a candidate for publick office.

It is submitted that the difficulty, if not total impossibility of drawing the line and the ease with which the law may be eluded, are such as in fact to have done away, in our republican constitution, what might have been held as good common law, under a monarchical government.

The opinion of the court was afterwards delivered by

PARSONS, C. J. The defendant has been convicted by the verdict of a jury of publishing a libel. On the trial he moved to give in evidence in his defence, that the contents of the publication were true. This evidence the judge rejected, and for that reason the defendant moves for a new trial.

It is necessary to consider what publication is libellous: and the reason why a libellous publication is an offence against the commonwealth.

A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive and expose him to publick hatred, contempt or ridicule.

The cause why libellous publications are offences against the state si their direct tendency to a breach of the publick peace by provoking the parties injured, and their friends and families to acts of revenge, which it would not be easy to restrain, were offences of this kind not severely punished. And every day's experience will justify the law in attributing to libels that tendency, which renders the publication of them an offence against the state. The essence of the offence consists in the malice of the publication, or the intent to defame the reputation of another. In the definition of a libel, as an offence against law, it is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character and if the publication be true, the tendency of it to inflame the passions, and to excite revenge, is not diminished, but may sometimes be strengthened.

The inference is therefore very clear, that the defendant cannot justify himself for publishing a libel, merely by prov-

ing the truth of the publication, and that the direction of the judge was right.

If the law admitted the truth of the words in this case to be a justification, the effect would be a greater injury to the party libelled. He is not a party to the prosecution, nor is he put on his defence: and the evidence at the trial might more cruelly defame his character than the original libel.

Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases, where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame.

Upon this principle a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel.

And when any man shall consent to be a candidate for a publick office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against their laws.

And every man holding a publick elective office may be considered as within this principle: for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election, if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct.

For the same reason the publication of falsehood and calumny against publick officers, or candidates for publick offices, is an offence most dangerous to the people, and deserves

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punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties.

But the publication of a libel maliciously and with intent to defame, whether it be true or not, is clearly an offence against law, on sound principles, which must be adhered to so long as the restraint of all tendencies to the breach of the publick peace, and to private animosity and revenge is salutary to the commonwealth.

The defendant took nothing by his motion, and was afterwards sentenced to two months imprisonment with costs.

JAMES PRESCOTT, PLAINTIFF IN *SCIRE FACIAS*,
versus
LEMUEL PARKER, TRUSTEE OF SIMON GILSON.

A judgment debtor, against whom an execution may issue, is not liable to an attachment as the trustee of the judgment creditor. But if, being so attached, he discloses the judgment as effects or credits of the creditor in his hands, he is not held to pay interest on the judgment, because he has not unjustly detained it.

A QUESTION arising in this case at the sittings before *the chief justice* after the last October term at *Cambridge*, he reserved it for the decision of the whole court, and having consulted his brethren, he now reported the case, with their opinion as follows.

Gilson having recovered judgment against *Parker* for a large sum of money; as soon as, or not long after the rendition of the judgment, the goods, effects and credits of *Gilson* were attached, in the hands of *Parker* as his trustee, at the suit of several of *Gilson's* creditors, the plaintiff's attachment being made the last. *Parker* disclosed the debt due by that judgment, as all the goods, effects or credits of *Gilson* in his hands, and he was adjudged the trustee of *Gilson* in the several suits, on which the attachments were made.

If *Parker* had denied that he was a trustee in consequence of that judgment, he might have been discharged, because *Gilson*, by suing his execution, could have compelled him to satisfy it, he not having any defence at law(1). But as

(1) *Howell* vs. *Freeman & Tr. ante Vol.* 3. 121.

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the present suit is a *scire facias*, on the original judgment still in force, to have execution against the body, goods and effects of *Parker*, because he has not exposed effects of *Gilson* to satisfy that judgment, or satisfied it in any other way, the only question before the court is, whether the judgment recovered by *Gilson* has been legally satisfied by *Parker*, by his discharging the executions of the prior attaching creditors.

It is admitted that the judgment has been thus satisfied, unless *Parker* is liable by law to pay interest on that judgment until it was satisfied.

Interest is allowed in an action of debt on judgment, as the measure of damages for unjustly detaining the debt. In this case he was obliged by law to detain the debt from *Gilson*; and therefore he cannot be answerable to the attaching creditors for damages for the detention. Consequently *Parker*, having fully satisfied the judgment recovered by *Gilson*, had no effects of his in his hands for the benefit of the plaintiff, who unfortunately was, in order of time, the last attaching creditor. *Parker* must now be discharged, but he is not entitled to costs, because he did not come in at the first term, and submit himself to an examination pursuant to the statute.

JAMES SAVAGE, PLAINTIFF IN ERROR,
versus
BENJAMIN GULLIVER.

A writ of error does not lie upon a judgment of a justice of the peace from which judgment an appeal lies to the court of common pleas, nor upon a judgment of the court of common pleas, where an appeal lies to this court.

THIS was a writ of *error* brought to reverse a judgment rendered by a justice of the peace. The original declaration was *assumpsit* for money had and received to the use of the original plaintiff, who is the plaintiff in error.

The facts were agreed, before the justice, to be as follows. The plaintiff had paid to the defendant the sum of

A non-commissioned officer or soldier of the militia, for a default of appearing at a company muster is liable to a fine of two dollars, and for a like default at a battalion or regimental muster, to a fine of four dollars by statute of 1805, c. 114. and he is now liable to no other fines.

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five dollars thirty-three cents, which the latter had demanded as clerk of a military company in *Boston*, in which the plaintiff was enrolled, that is to say, two dollars for a fine for his non-appearance at a muster of the company on the first Tuesday of May, 1807, and three dollars thirty-three cents for deficiency of equipments at the same muster. The defendant agreed to take no advantage of the voluntary payment of the fines by the plaintiff, and the question referred to the justice upon the facts agreed, was whether the defendant had or had not a right to demand and receive the said fines. The justice rendered judgment against the plaintiff, who filed his bill of exceptions, from which the foregoing facts appear, and brought his writ of error to this court.

The defendant in error was defaulted; and the court calling on the plaintiff in error, who was an attorney of this court, to support his writ, he cited the statute of 1805, c. 114. § 6. which is in addition to the statute of 1793, c. 14. for regulating and governing the militia, &c. By the additional act, each non-commissioned officer and soldier, who shall unnecessarily neglect to appear at the time and place appointed for a battalion or regimental review or muster, armed and equipped according to the act of 1793, shall *in lieu of the fines now provided by law*, pay as a fine for each default, the sum of *four dollars*, and at each company review or muster, for each default the sum of *two dollars*.

By § 18. of the act of 1793, the requisite equipments of a non-commissioned officer and private are described, and he is ordered to be constantly provided with them. By § 19. if on a muster day, or at any other time of examination, he appears unprovided with such equipments, he shall pay a fine not exceeding *twenty shillings*, in proportion to the articles of which he shall be deficient, at the discretion of a justice, &c. By § 20. every person liable to do military duty, neglects to appear, &c. armed, &c. shall pay as a fine for such default *ten shillings*: and every person, who shall appear at any muster, with his arms *in an unfit condition*, shall pay a fine of *three shillings* for each and every such default. By § 24. every captain is ordered to call his company together *three days* in each year for discipline, and

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once on the *first Tuesday of May*, for the express purpose of examining and taking an exact account, &c. at which time every article of equipment, &c. must be brought: and every person, who shall on the said first Tuesday be absent, and shall not send his arms, &c. to be examined, shall be fined, for every article not brought or sent, *as is herein before directed*, besides the sum of ten shillings for non-appearance as aforesaid.

By the act of 1793, the fine for non-appearance was the same at all reviews or musters, and a further penalty was inflicted for deficiency of equipments on the first Tuesday of May, if not at other times. Perpetual disputes arising from the disposition of the clerks of the military companies to demand fines under the 19th § of that act for deficiency of requisite equipments induced the legislature to make the new provision in the case contained in the law of 1805, c. 114. by which fines for deficiency of equipments are no longer to be demanded, in addition to fines for non-appearance. For each default in unnecessarily neglecting to appear, &c. armed and equipped, &c. the fine is now four dollars at a battalion or regimental muster, and two dollars at a company muster. The word *default*, by necessary construction, applies here as much to the neglect of arms and equipments, as to neglect of appearance: the whole constitutes one offence, and is subject to one penalty by force of the words, *in lieu of the fines now provided by law*, meaning all the fines *in pari materia*. It is very clear that the new fines are not intended to be added to the old ones. Yet the clerks of the companies, since the last statute, have demanded the newly enacted penalties of four and two dollars for non-appearance, and also the penalties of the former act for deficiency of equipments, in lieu of which the new fines are imposed. So that for every default on the first Tuesday of May, they have demanded three dollars and thirty three cents more than the law prescribes. The necessity of settling the true construction of the statute by the highest judicial authority will be very apparent, when it is considered that this extra penalty may amount, in the town of *Boston* alone, to a tax of three or four thousand dollars *per annum*.

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Here the court desired the plaintiff in error to shew that a writ of error lies to this court from a judgment of a justice of the peace, from which by law an appeal lies to the court of common pleas.

On a subsequent day in the term the plaintiff in error, in obedience to the foregoing suggestion of the court, argued to the following effect.

1. It is observable that the statute of 1783, c. 42. describing the power of justices of the peace in civil actions has no express words to that effect: it must therefore be *by implication*, that this court is ousted of the power, which it might have exercised, had no appeal from such judgment of a justice been granted. His jurisdiction would then have resembled that of inferior courts of record in *England*, whose proceedings may be examined and corrected in the court of king's bench by writ of error or *certiorari*. This court has cognizance of all such matters, as were cognizable by the superior court of judicature, &c. under the provincial laws. The powers of that court are declared in the provincial act of 11 *Will.* 3. c. 3. to be as extensive as those of the courts of king's bench, common pleas and exchequer in *England*.

2. The chief design of the statute in giving an appeal from the judgment of a justice was probably to give the party the advantage of a trial of the facts by a jury, for without such appeal the party could have brought error for matter in law. But in the present case no trial by a jury was necessary, for the parties agreed on the facts: and to have appealed to the common pleas would have been making a circuit to arrive at the object. "Judgments," says Sir *Henry Hobart*, "are laws, when not to be reversed." But if this question is to be definitely settled in the courts of common pleas, it may happen that we shall have different law in each county of the state. If the decision of the common pleas would have given no more satisfaction than that of a justice of the peace, we ought not to be precluded from coming immediately to the fountain of law, without the special restriction of a statute. In *Carter's Reports*, 222. *Vaughan, C. J.* of C. B. says, "a writ of error out of an "inferior court lies as properly here, as in the king's bench.

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" But generally writs of error for many years have not been " brought here: the reason is matter of conveniency; be- " cause if you bring a writ of error here, and the judgment " is affirmed, yet it may be brought into the king's bench, " and be there reversed: though indeed, if a writ of error " be brought here, we must proceed upon it. But no man " will advise his client to bring it here, but rather into the " king's bench, where it is final."

3. No question precisely similar to this can be found in the *English* books; for an appeal, as the word is used here, is not allowed from any courts, whose proceedings follow the course of the common law. Facts may be as well ascertained by a jury in one court as in another. But any error of law may be shewn to the king's bench, from the lowest court of record in the kingdom: and that court cannot refuse cognizance thereof.

4. Analogies of great weight are derivable from the practise of the king's bench, in numerous instances of *certiorari*, of which that court will not be deprived, except by special and direct words of a statute.

By the statute of 22 *Car.* 2, c. 1. § 6. commonly called the conventicle act, a strong presumption is raised, that the legislature intended to prevent the interference of the king's bench. But that court asserted their jurisdiction by *certiorari* to a justice, even after appeal, and a trial, verdict and judgment by the quarter sessions, to whom only an appeal was granted by that statute(1).

The statute of 13 *Eliz.* c. 9. had made orders of commissioners of sewers binding without the royal assent, and had also enacted that they should not be reversed but by other commissioners. Yet, says *Kelynge, C. J.* in the king's bench(2); " It never was doubted, but that this court " might question the legality of their orders: and you can- " not oust the jurisdiction of this court, without particular " words in acts of parliament. There is no jurisdiction, " that is uncontroulable by this court."

(1) *Rex* vs. *Moreley & al.* 2 *Burr.* 1040 1 *W. Black. Rep.* 231. S. C.
(2) 1 *Mod.* 45.

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The case of *Rex* vs. *Whitebread*(3), taken in connexion with the case of *Rex* vs. *Abbot*, reported at length in the margin of the principal case, strongly favours this notion of the jurisdiction of this court. In the first case, where there was no doubt of the intention of the legislature to take away, by statute of 6 *Geo.* 1. c. 21. the superintending process of *certiorari* by the king's bench in cases under the statute of 12 *Car.* 2. c. 24. § 33. the court would not permit a *certiorari* to issue; but the argument upon the necessity of an express restriction of their authority to award that writ is very complete. In the second case, *Rex* vs. *Abbot*, decided three years after upon a statute of 11 *Geo.* 1. c. 30. § 16. although the *certiorari* in parallel cases had been expressly taken away by a statute only one year before; and although it was argued that there was no hardship in taking away the *certiorari*, for there is a remedy on the merits by an appeal from a conviction by justices to the quarter sessions, and, unless in matters of law or form, a defendant would have no redress, if a *certiorari* were allowed; and although the proceedings of the quarter sessions on the appeal might have been corrected in the king's bench, the court decided that the *certiorari* was not taken away. Lord *Mansfield* declares the old established rule to be, "that "nothing but express negative words shall take away the "jurisdicton of this court."

Let it be supposed that under the militia law of this commonwealth, which has provided that "no appeal shall be "allowed to either party from the judgment of a justice of "the peace upon any prosecution or complaint brought by "any clerk of a company," &c. an appeal had been allowed to military commissioners only, there to be finally determined: from the above cited decisions it seems that this court would not be deprived of their power of issuing a *certiorari*, any more than they now are by our present statute; and that a party aggrieved might bring his case before this court without the intervention of the appellate jurisdiction. Yet it might be urged, that justice might have been done, and the parties satisfied with the judgment

(3) *Doug.* 549.

of the quarter sessions in the *English* cases, or of the commissioners in the case supposed, and that this also might have been the result of an appeal to the common pleas in the present case.

These instances are where statutory provisions have changed the order of proceeding; yet the higher courts of common law are not deprived of their superintending jurisdiction. But in the principal case, the proceedings pursued the forms of the common law; and therefore seem indisputably entitled to all the advantages of the common law, of which not the least is the superintendence of this court over all inferior jurisdictions. If this court cannot be ousted of this jurisdiction without special words; if in case no appeal from a justice's judgment had been granted by statute, this court would have controuled and corrected the erroneous judgment, it seems equally empowered since the provisions of the statute granting appeals to the court of common pleas. If it has cognizance, it ought in the present case to be exercised, or the meaning of the expression, that the writ of error is a writ of right is exceedingly narrowed.

The plaintiff in error, besides this argument, relied very much on the general tenor of the case of *Mountfort* vs. *Hall, in error* (4) to confirm his opinion of the extent of the jurisdiction of this court. That case was very fully argued and carefully considered. The cause indeed turned upon the construction of a statute provision, taking away the right of appeal in a certain case, from a justice's judgment, which was alleged to be an unconstitutional provision. The whole court however supported the express meaning of the statute, and *Sewall, J.* said; "this construction may be the more "readily adopted, as any party aggrieved by a decision of "a justice of the peace, or of any other court, upon a mat- "ter of law arising, and apparent upon the record or minutes "of the court, has another and more specific remedy by "writ of error or *certiorari.*"

The opinion of the court was afterwards delivered as follows by

(4) *Ante vol.* 1. 443.

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PARSONS, C. J. The proceedings of a justice of the peace in an action commenced before him, in which either party aggrieved at his judgment might have appealed to the court of common pleas, have been brought before us by writ of error. We are satisfied that the writ issued improvidently, and for that cause must be quashed.

This court, from the powers given it, has a general jurisdiction to correct errors in the proceedings of inferior courts, either by writ of error, or by *certiorari*, according to the nature of those proceedings, in all cases where another remedy for the party aggrieved is not provided. From all judgments of a justice, where the party may appeal to the common pleas; and from all judgments of the common pleas, where an appeal lies to this court, the remedy by appeal ought to be pursued. It is less expensive and more convenient than a writ of error; and further relief may be granted on appeal than can be on a writ of error. On appeal the cause of error may be removed by amendment; mistakes in fact on the merits may be corrected; neither of which can be done on error: and at the same time an erroneous judgment below may be amended by the court having appellate jurisdiction. The statute, in giving an appeal, has in our opinion taken away, by a reasonable implication, the remedy by error, unless in cases where the aggrieved party, without any laches on his part, could not avail himself of an appeal.

But if it appear on record that the plaintiff in error might have appealed, the court will *ex officio* quash the writ; or the court will quash it on a plea in abatement disclosing the plaintiff's remedy by appeal. In this case it appears on the record that the plaintiff in error might have sought his remedy by appeal to the common pleas. He cannot come to this court *per saltum*, but he ought to have appealed, and if dissatisfied with the judgment of the common pleas, he might then have sued his writ of error.

As the point intended to be submitted to the court is of general importance to the militia, we will give our opinion upon it.

The eighteenth section of the statute of 1793, c. 14. declares what arms and equipments each private soldier shall at all times be provided with. In the nineteenth, twentieth,

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and twenty-fourth sections, penalties were imposed on the neglect of the soldier to appear on the parade, with his arms and equipments. If he neglected to appear, he was liable to a fine of *ten shillings*, and also to a fine of *twenty shillings*, if his arms and equipments were not on the parade. If part of them were there, then to a fine of such a part of the twenty shillings, as the articles of his arms and equipments absent were in proportion to the whole articles required: which proportion, from the nature of the equipments, it must have been difficult to ascertain. But the justice was bound to exercise his discretion. If the soldier appeared with his arms and equipments not in good order, he was to be fined three shillings: and perhaps a proportion of the twenty shillings for the articles not present. If he was absent, and his arms and equipments complete, he was then subject to a fine of ten shillings only. So that in every case, where he was liable to a fine, he was liable to more than one, except when all his arms and equipments were on the parade and in good order.

To avoid this variety of fines, and perhaps to compel the personal appearance of the soldier on the parade, when he has no reasonable excuse, was the intention of the sixth section of the additional act (*stat.* 1805, c. 114.) By this section, for every default of appearance, armed and equipped, at a battalion or regimental muster, the soldier forfeits *four dollars*, and this sum is forfeited, whether he is present, not armed and equipped; or absent, and his arms and equipments are, or are not on the parade. But if the default be at a company muster, the penalty is only *two dollars*. And no other fines is he, in our opinion, liable to forfeit: and the justice's discretion in the apportionment is taken away.

THE INHABITANTS OF LEICESTER

versus

THE INHABITANTS OF REHOBOTH.

If the town of A. has incurred expenses in the support of a pauper supposed to have his legal settlement in B. and the overseers of A. give notice thereof to the overseers of B. and request his removal; although the notice be not answered nor objected to, and the expenses are paid by the town of B. but the pauper is not removed; in an action against the town of A. for after expenses incurred by the town of A. in the support of the pauper, the defendants are not concluded from denying that the settlement of the pauper is in B.

THIS was an action of the case in *assumpsit* brought for the recovery of money expended by the plaintiffs between August 18, 1804, and February 9, 1806, in the support of a pauper, and by them alleged to be chargeable to the town of *Rehoboth*. The action was pending in the county of *Worcester*, and upon trial before *Sewall, J.* at the sittings after the last September term, a verdict was taken for the defendants, subject to the opinion of the court on the following statement of facts.

"The overseers of the poor of *Leicester*, on the 11th day of October, 1802, gave notice in writing, as the law requires, to the overseers of the poor of *Rehoboth*, that said pauper was then in *Leicester*, was poor, and had become chargeable to that town, and requested his removal: which notice was not answered, nor objected to, on the part of *Rehoboth*, within two months as the law requires. Afterwards the said town of *Rehoboth* paid said town of *Leicester* all the expenses incurred by the latter in the support of said pauper previous to said notice, and for more than two months subsequent thereto: but said pauper has never been removed.

"Now if upon this state of facts the court shall be of opinion that the defendants have a right to contest the settlement of said pauper in their town, in this action, then the parties agree that said verdict shall stand, and that judgment shall be rendered accordingly: but if the court shall be of a different opinion, then the parties agree that said verdict shall be set aside, that the defendants shall be defaulted, and that judgment shall be rendered for the plaintiffs for fifty dollars damages, with costs of suit.

The action stood continued *nisi*, and at this term, no argument having been had, the opinion of the court was delivered as follows by

PARSONS, C. J. From the facts in this case as stated by the parties, it may be presumed that the plaintiffs consid-

er the defendants concluded from denying the allegation of the plaintiffs that the settlement of the pauper is in *Rehoboth;* because on the 11th of October, 1802, the pauper then residing in *Leicester,* and having been chargeable to that town for his maintenance, the overseers of the poor gave notice thereof to the overseers of *Rehoboth,* requesting payment and a removal of the pauper; which notice was not answered to, nor objected against in two months, but the expenses of supporting the pauper were voluntarily paid by the defendants.

Whether these facts amount to an estoppel, is the question to be decided according to the true construction of the statute of 1793, c. 59.

By this act there are three methods, in which the place of a pauper's settlement may be determined; and a determination in either way will conclude the towns who are parties to it.

One method is by judgment upon a complaint filed before a justice of the peace, or a court of common pleas. *Section* 10, 11.

Another method is by judgment in an action, for the maintenance of a pauper, against the town, in which his settlement is alleged in the writ. *Sect.* 9.

The third method, which is applicable to the present question, is provided in *Sect.* 12. When the overseers of any town, having been at expense in supporting a pauper, shall send a written notification to the overseers of the town, where his settlement is supposed to be, stating the facts relating to such pauper, and requesting his removal; if such removal be not effected nor objected to within two months after such notice given, then the overseers giving notice may remove the pauper to the town where his settlement is supposed, *the overseers whereof shall be obliged to receive and provide for him;* and their town shall be liable for the expenses of his support and removal, to be recovered by action, in which the settlement of the pauper shall not be contested. And the plaintiffs are supposed to insist that by virtue of this method, the defendants cannot contest the settlement alleged in their writ.

After mature deliberation we are of a different opinion. Estoppels are not to be favoured, because the truth may be

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excluded. And no party ought to be precluded from making a defence according to the truth of his own case, unless in consequence of some positive and unequivocal principle of law.

If when the removal was not objected to in two months, the plaintiffs had in fact removed the pauper to *Rehoboth*, the defendants could not then have denied the settlement of the pauper to be in their town: for the act provides that when a removal is thus effected to the town not objecting, it shall be the duty of the overseers of that town to receive and support the pauper. Or if *Leicester* had not removed the pauper, but had without or after the removal commenced an action against *Rehoboth* to recover the expenses of supporting the pauper, and had recovered judgment, this judgment would have concluded *Rehoboth*. But in the present case, *Leicester* did not remove the pauper to *Rehoboth*, and *Rehoboth* paid the demands of *Leicester* voluntarily and without an action. We do not therefore consider the defendants as concluded, in this action, from denying that the pauper's settlement is in *Rehoboth*: and we are satisfied that the verdict is right; and that judgment must be entered accordingly.

Bigelow for the plaintiffs.

Bangs for the defendants.

OLIVER EAGER AND UX. PLAINTIFFS IN ERROR,

versus

THE COMMONWEALTH AND ABRAHAM MUNROE, TERTENANT.

A writ of error must be sued within twenty years from the time when the title to it accrued, or within five years after the *same* disability, which existed at that time, has ceased.

THIS was a writ of error brought in the county of *Worcester* to reverse a judgment of confiscation of the inferior court of common pleas of that county in December, 1780, rendered upon a certain complaint "wherein the commonwealth of *Massachusetts*, by *Levi Lincoln* Esquire, specially appointed by *Robert Treat Paine* Esquire, then attorney general, for that purpose, was prosecutor and plaintiff against

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Michael Martin, late of *Northborough*, in said county of *Worcester*, gentleman, and *Zilpher* his wife, in which said complaint it was,among other things, alleged that the said *Michael* and *Zilpher* had freely renounced all civil and political relation to each and every of the *United States*, and had become aliens ; and that three several tracts of land therein described, lying in *Northborough* aforesaid, of which the said *Michael* and *Zilpher*, in her right, had been seized and possessed, ought to escheat,enure and accrue to the sole use,benefit and behoof of the late government and people of the state of *Massachusetts Bay*, now commonwealth of *Massachusetts*."

The writ of error was sued out by *Oliver Eager*, of said *Northborough*, and *Seraphina* his wife, who was the daughter and heir of the said *Michael* and *Zilpher*, who are both alleged in the writ to be deceased. The writ issued July 31, 1806, and was returnable at the September term following. After oyer of the record complained of,

The defendants filed the following plea in bar, *viz.*

" The said *Abraham Munroe*, for himself in his own proper person, and *James Sullivan*, Esquire, attorney general of the same commonwealth of *Massachusetts*, under which, by deed of bargain and sale with warranty, the said *Munroe* holds the lands described in the judgment, on which the same writ of error is brought, come here in court, and defend, &c. and submitting to whatever, in this court, in this cause, they by law ought to submit to, for plea say, that by the process and record certified on the writ of error aforesaid, by the said chief justice of the said court of common pleas, and of which oyer has in this case been granted, it appears that the same judgment, on which the same writ of error is brought, was given and rendered at an inferior court of common pleas begun and held at *Worcester*, within and for the county of *Worcester*, on the second Tuesday of December, being the twelfth day of said month,*Anno Domini*, 1780, by adjournment from the first Tuesday of the same December, by a resolve of the great and general court. And the said *Munroe* and *Sullivan* further, as before plead and say that by an act or law of the said commonwealth of *Massachusetts*, made and passed by the general court

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thereof on the fifteenth day of February in the year of our Lord 1806, it was enacted and provided, that no judgment in any action or suit theretofore rendered should, from and after the passing of the same act, be reversed or avoided, for any error or defect therein, unless the writ of error, brought for recovering the same, should be sued out within twenty years next after the rendition of such judgment; and this the said *Munroe* and *Sullivan* are ready to verify; wherefore in as much as it appears by the record, now on the same writ of error certified, that the judgment, on which the same writ is so brought, was rendered more than twenty years before the thirty-first day of July, 1806, and that the said writ was brought and issued on that day, the said *Munroe* and *Sullivan* pray the judgment of the court here, whether the said *Oliver Eager* and *Seraphina* his wife shall have and maintain the same writ of error for the reversal of the said judgment. *J. Sullivan.*
A. Munroe.

"And the said *Oliver* and *Seraphina* say that by any thing by the said *Sullivan* and *Munroe* in the plea aforesaid alleged, they the said *Oliver* and *Seraphina* ought not to be precluded from having their writ of error aforesaid maintained: because they say that, at said *Northborough*, on the thirty-first day of January 1783, the title of the said *Seraphina* to her said writ of error first accrued, and at that time the said *Seraphina* was there a minor, under the age of twenty-one years, *viz.* of the age of fifteen years, and no more: and that there afterwards, *viz.* on the nineteenth day of June, 1785, the said *Seraphina* being still a minor, under the age of twenty-one years, *viz.* of the age of eighteen years, and no more, she was lawfully married to the said *Oliver*, and has been ever since covert of the said *Oliver* to this time: and this the said *Oliver* and *Seraphina* are ready to verify: wherefore they pray judgment if, by any thing by the said *Sullivan* and *Munroe* above in pleading alleged, they ought to be precluded from having their writ of error aforesaid maintained, &c." *T. Bigelow.*

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"And the said commonwealth of *Massachusetts*, by *Barnabas Bidwell*, attorney general, and the said *Abraham Munroe* for himself in his own proper person, say that by any thing in the replication aforesaid of the said *Oliver Eager* and *Seraphina* his wife alleged, they the said *Oliver* and *Seraphina* ought not to have their said writ of error for the reversal of the judgment aforesaid maintained, because, though true it is, that the title of the said *Seraphina* to her said writ of error first accrued on the thirty-first day of January, 1783 and though it is also true, that she was at that time under the age of twenty-one years, as in the replication aforesaid is alleged: yet the said commonwealth and the said *Munroe* say, that after the title of the said *Seraphina* to her said writ of error had accrued as aforesaid, and after she had become of the full age of twenty one years, the term of five years had elapsed before the suing out of the said writ of error of the said *Oliver* and *Seraphina* in this case, *viz.* at *Northborough* aforesaid, on the first day of March, 1794: and this the said commonwealth and the said *Munroe* are ready to verify: wherefore they pray judgment, if the said *Oliver* and *Seraphina* by any thing in their replication above alleged, ought to have their writ of error maintained."

B. Bidwell.
A. Munroe.

To this rejoinder the plaintiffs in error demurred generally; and the defendants joined in demurrer.

Upon these pleadings the cause was argued at the last September term at *Worcester*, from whence it was continued *nisi* and was at this term again spoken to by *Bigelow* for the plaintiffs in error, and *Bidwell, attorney general*, for the defendants.

[*By* statute *of* 1805. c. 35. *it is enacted that no judgment theretofore or thereafter rendered, shall be reversed or avoided for any error therein, unless the writ of error brought for reversing the same shall be sued out within twenty years next after the rendition of such judgment.*

Provided *that if any person entitled to such writ shall at the time such title accrued, be within age, covert, or non-compos mentis: then such person his or her heirs, executors*

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&c. may bring such writ, as he or she might have done, if this act had not been made; so as the same writ of error be sued out within five years after the coming of age, discoverture, coming of sound mind, or death of such person, whichever shall first happen, and not afterwards.]

Bigelow. The question before the court is whether the plaintiffs in error have by these pleadings brought themselves within the proviso in the statute. I contend that *Seraphina* the feme plaintiff, has never ceased, since her title to her writ of error accrued to her, to be within one or the other of the disabilities described in the proviso. So that the statute has never begun to run.

In the case of *Strithorst* vs. *Graeme* (1), it is said by the court that "while any of the disabilities mentioned in the "statute of limitations continue the party may, but is not o- "bliged to commence his action: the statute doth not run, "while any of those disabilities continue."

It is true that in the case of *Duroure* vs. *Jones*(2), the court consider it as a rule of law not then to be disturbed that when any of the statutes of limitations had begun to run, a subsequent disability would not stop their running. But in this case the statute had not begun to run before the subsequent disability attached. If before coming of age, the feme plaintiff in error had become *non compos*, and so continued to the time of bringing this writ, shall the statute be construed to deprive her of her title to the writ? Shall it be said that in that case such a subsequent disability shall not attach? would not this be contrary to the humanity of the law which declares that the act of God injures no one? Having never been free to exercise her will in the prosecution of this writ since her title to it accrued, she is neither in the words nor the equity of the statute, but is clearly within the meaning and intent of the legislature in the proviso.

Bidwell. There is no case that I can find expressly in point. But the statute is peremptory and universal, and unless a party can bring himself within the intent of the proviso he is concluded. And to bring himself within the proviso he

(1) 3 *Wils.* 145.
(2) 4. *Term R.* 300.

must shew that the *same* cause, which existed at the time his title to the writ first accrued, continued to exist until within five years before the writ brought. Under the *English* statutes of limitation, if the party is within the realm at the time the judgment is rendered, although he goes out of it the next day and continues thenceforth absent, yet it is held that the statutes attaches.

The second disability was voluntary in the feme plaintiff; she had a right to contract it and she brought it upon herself, and has no reason to complain of its legal consequences; and this essentially differs her case from that of one becoming *non compos.* It seems hardly correct to call this a disability, since she might during its existence have brought her writ, as in fact she has now brought it before it has ceased. There is no ground to admit equitable considerations in the construction of this statute: and if there were, the great good produced by its general operation will more than countervail any particular inconveniences.

Bigelow in reply. The attorney general has argued upon the supposition that the statute had begun to run, before the second disability attached. But I contend that the five years had not then begun, nor have they yet begun: since she has never been at liberty to bring this writ at her own will. The law allows a minor to contract marriage; for that purpose she had a legal discretion. But the law never considers an infant to have such discretion, as voluntarily to deprive himself of his legal rights, so as to be bound when he come to full age.

The opinion of the court was afterwards given by

PARSONS, C. J. Error to reverse a judgment in favour of the commonwealth, vesting by way of escheat certain lands claimed by the plaintiff's wife, as heir to *Michael Martin* and his wife, against whom the judgment was rendered in December, 1780.

The commonwealth pleads, in bar of the writ, the statute of 1805. c. 35. limiting the bringing of writs of error to the term of twenty years from the rendition of the judgment.

The plaintiffs in error, to bring themselves within the proviso of the statute, reply that the wife's right first accrued

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when she was an infant, and that the plaintiff inter-married with her during her infancy.

The defendants, in their rejoinder, agreeing the infancy of the plaintiff's wife at the time her title accrued, and also their inter-marriage during her infancy, say that, after her title to the writ of error accrued, and after she became of full age, five years had elapsed before suing out the writ in this case.

To this rejoinder there is a demurrer and joinder.

In the proviso of the statute before referred to it is declared, that if any person, entitled to his writ of error, shall, at the time the title accrued, be an infant, feme covert, or *non compos mentis*, he may sue his writ of error after twenty years, so that it be sued within five years after the disabilities are removed, or the death of the person disabled, whichever shall first happen.

It is therefore very clear that the infancy of the wife, at the time her title accrued, cannot bring her within the exception, because the writ was not sued out within five years after her coming of age. But the plaintiffs contend that as another disability of coverture occurred before the termination of her infancy, which disability existed when her right accrued, they are within the proviso; because there has been no moment of time, since her right accrued, in which she has not been disabled.

As the plaintiffs are barred by the enacting clause, unless they are within the proviso, the effect of their replication must depend upon the construction of the proviso. And we are all satisfied that the disability, to be sufficient to bring the plaintiffs within it, must be existing at the time their right first accrued. This opinion is supported by the express words of the proviso, and we have no power, by an equitable construction, to defeat the operation of the enacting clause.

Statutes of limitation are beneficial statutes, made to quiet people in their possessions, and to prevent suits at law, after an unreasonable delay in commencing them. In the case of *Lloyd* vs. *Vaughan*(3), the reversioner brought error to reverse a common recovery, after twenty years from its being

(3) *Str.* 1257.

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suffered, but within twenty years after his title accrued, and he was barred, because he was not a person within the proviso made to relieve against the disabilities there mentioned: and it was holden that he had no remedy, unless the reversion had fallen within twenty years after the recovery. And in *Prideaux* vs. *Webber* (4), where the statute of limitation was pleaded to an action of assault and battery, and the plaintiff replied, that the courts were shut up by a rebellion, the plea was holden good, because the exception replied was not within the statute. Both these cases may be considered as hard cases, but they were barred.

In the present case the husband might have sued his writ within the twenty years. He was not under any disability, and ought to have prosecuted the rights of his wife. If we were once to admit a disability not existing when the right accrued, as within the proviso, it would be difficult to decide how far we must go. In the limitation of personal actions, the plaintiff, a female infant, may marry after her right has accrued: or an infant, just before he is of age, and after the cause of action accrued may go abroad; and however long absent, he would prevent the effect of the statute until his return. We must therefore adhere to the express words, and natural and clear import of the proviso: and the rejoinder must be holden good and sufficient in law.

Let the plaintiff's take nothing by their writ.

(4) 1. *Lev.* 31.

EBENEZER WILLIAMS AND ANOTHER

versus

BENJAMIN HICHBORN AND OTHERS.

Under the statute of 1791. c. 60. the guardian of a person *non compos* may, on being duly licensed therefor, lawfully sell in fee simple the estate tail of his ward during his life, for the payment of his debts, and by such sale the estate tail is extinguished, and the remainders legally barred.

THIS was a writ of *formedon in remainder* pending in the county of *Norfolk*, in which the demandants count upon the seizin in fee of *Mary Williams*, and a devise by her of the de-

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manded premises to her grandson *George Baker*, when he should arrive at the age of twenty-one years, and to the heirs of his body lawfully begotten: And in case he should die after his arriving at the age of twenty-one years, and leave the devised premises, but leave no heirs of his body lawfully begotten, then a devise over to *Zebediah Williams* in fee. The demandants then aver that *George Baker* the devisee, having arrived at the age of twenty-one years, entered into the premises, and became seized thereof in fee tail general, by force whereof the said *Zebediah* became seized of the said remainder in fee: that upon his decease the said remainder descended to the demandants, and two others, his heirs and only children: that afterwards the said *George Baker* died so seized in fee tail, without heirs of his body lawfully begotten: whereupon one moiety of the said premises remained to the demandants by form of the gift aforesaid: of which they complain that the tenants have deforced them, and still hold them out.

At the last term of this court in *Dedham*, the cause was submitted to the opinion of the court upon a statement of facts, by which it is agreed by the parties, that *Mary Williams*, the grandmother of the demandants, on the 9th day of August, 1756, was seized in fee of the demanded premises, and on the same day made her last will, which was afterwards duly proved, &c. and by which she devised the demanded premises to *George Baker*, her grandson, "*when he shall* "*arrive to the age of twenty one years, and the heirs of his* "*body lawfully begotten:*" afterwards is a devise in the following words: "Item. *My will is that in case my grandson* "George Baker, *to whom I have given, &c.* [describing the lands before devised to him] "*when he arrives at the* "*age of twenty one years, shall not arrive to those years,* "*then the said pieces of land, &c. go to my son* Zebediah "Williams, *his heirs and assigns.* Item. *My will is,* "*that in case my grandson* George Baker *die after his ar-* "*rival to the age of twenty one years, and leave the said* "*pieces of land, &c. but leave no heirs of his body lawfully* "*begotten, that then the said pieces of land, &c. go to my* "son Zebediah Williams, *his heirs or assigns:* that the said

testatrix died so seized, and the said *George Baker*, having arrived at the age of twenty one years, entered under the devise, and never alienated or conveyed away the premises himself: but that in 1788 he became *non compos mentis*, and *George Baker, sen.* his father, was duly appointed his guardian: that in 1802 the said guardian obtained a license from this court to sell the demanded premises, for the payment of the debts of his said ward: that in pursuance of said license, the said guardian sold and conveyed all the right, title and interest of his said ward in said demanded premises, by deed of quitclaim, to the tenants, who afterwards entered and took possession thereof, and have ever since continued to possess and enjoy them: that *Zebediah Williams*, the remainder man, and father of the demandants died in 1772, intestate, leaving four children his heirs at law: that neither he in his lifetime, nor the demandants since his death have ever alienated their interest in the demanded premises under said last will: And that the said *George Baker* died in 1807, without leaving any heirs of his body lawfully begotten.

If upon these facts it should be the opinion of the court, that the demandants ought to recover in this action, the tenants agreed to become defaulted, and that judgment should be entered for the demandants accordingly: otherwise the demandants were to become nonsuit, and judgment according to law entered upon such nonsuit.

The action stood continued *nisi* for argument, and now at this term

B. Whitman for the tenants observed, that he should make two questions in the case.

1. Whether *George Baker*, the devisee named in the will, took an estate tail or a fee simple.

2. Whether, if he took an estate tail, his guardian had authority to convey it under a license from this court.

As to the first question, *Whitman* contended that, taking the whole will together, which was the proper way to ascertain the intention of the testator in any particular clause, this devise created a fee simple. He relied principally on the condition of the devise over to *Zebediah Williams, in case said* George Baker *die after his arrival to the age of twenty-one years, and leave said pieces of land, &c.* from

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which it was to be inferred that the testatrix contemplated a power in him to convey his estate in the land; a power, which tenants in tail at the time this will was made did not possess, unless by the fictitious process of a common recovery, which was seldom used, and except to professional men hardly known in the country. To support this construction, *Whitman* cited the cases in the margin(1).

But if the court should be of opinion that this was an estate tail, *Whitman* held the sale by the guardian of the tenant in tail to be good and valid by force of the statute of 1791, c. 60. That statute authorizes a tenant in tail to aliene his estate by deed attended with certain formalities, and expressly makes lands holden in fee tail "liable and "subject to the payment of the debts of tenant in tail, in "the same way and manner as other real estates are liable "and subject, as well after the decease, as in the life time "of such tenant in tail." But other real estates were then, as now, liable to be sold by guardians of minors or *non compos* persons, under license from the courts of common law. If the ward in this case had been of sound mind, he could have conveyed this estate by his deed; and when a guardian is duly authorized pursuant to law, he has all the powers as to this point which his ward would have. It seems indeed to have been the intention of the legislature in this statute to put estates in fee tail and fee simple on a footing precisely similar, and to do away every distinction existing between them.

L. Richardson, for the demandants relied that the words of the devise in this will created an estate in fee tail general, with remainder to *Zebediah Williams*, the father of the demandants, by way of executory devise. And he thought the only points, which admitted of argument were, 1. whether this executory devise could be barred by the tenant in tail, without the concurrence of the remainder man, at common law. And 2. if it could be so barred, whether it could be also barred by the guardian of the tenant, who had

(1) *Cole* vs. *Rawlinson.* 1 *Salk.* 234.—*Loveacres* vs. *Blight. Cowp.* 356. *Doe* vs. *Halley.* 8 *Term R.* 5.—*Doe* vs. *Richards.* 3 *Term R.* 359.—*Oates* vs. *Brydon.* 3 *Bur.* 1898.—*Lee* vs. *Stevens & al.* 2 *Show.* 49.—2 *P. Will.* 282.—1 *T. Atkins.* 415. *Gilbert's L. of Dev.* 20, 21, 22, 61. *in notis.*

become *non compos*, within the intent of the act of 1791, c. 60. providing a more easy and simple method than was then in use of barring such estates.

In considering the first point, it is necessary to enquire whether this remainder be a vested one, or not. For if it is, it will follow from the authorities in the books, and particularly the case of *Boreton* vs. *Nicholls & al.* (2), that it cannot be barred without the concurrence of the remainder man.

To prove this remainder to be a vested one, may be cited the cases in the margin(3).

The second point leads to the enquiry, whether by the statute of 1791, c. 60. the tenant in tail could by his deed have barred those in remainder. Although by this act the tenant in tail, in general terms, is authorized to bar the entail, and all remainders and reversions expectant upon it; yet it is to be presumed, that it was never intended by this act (though it has been sometimes called omnipotent) to enable tenants in tail to bar remainders actually vested. This presumption is fortified by the additional statute [1804, c. 59], in which there is a provision for the remainder man's joining in the deed with the tenant in tail, in order effectually to bar the entail. To give a construction to the statute, which would enable tenants in tail to divest the vested rights of others, without receiving an equivalent, would be going further than has ever been done to support even common recoveries: which are allowed to bar remainder men and reversioners only on account of the ideal recompense in value, which is obtained as a substitute for the former estate, to descend according to the form of the original grant.

But admitting that the tenant in tail could have alienated the premises in fee, and thus barred those in remainder, yet the case does not shew that this has ever been done. For 1. The deed of the guardian of the tenant in tail is not such a conveyance as is described in the statute, which is effectually to bar the estate tail. It is the deed of the tenant in

(2) *Cro. Car.* 363.

(3) *Loddington* vs. *Kime.* 1 *Salk.* 224.—*Ld. Raym.* 208. *S. C.*—2 *Roll. Abr.* 395, 417. *Doe* vs. *Holmes.* 3 *Wils.* 237, 241.—*Doe* vs. *Rrason,* cited 3 *Wils.* 344.—3 *Term. R.* 484.—2 *W. Black.* 777.—*Fearne on contingent Remainders.* 21, 342, 514.

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tail only that can have that effect. 2. The statute authorizing guardians of persons *non compos mentis* to sell the estate of their wards for their support, &c. on obtaining license from this court for that purpose, was made prior to the statute permitting estates tail to be barred by deed. The first statute must be supposed to contemplate the disposition of such estates only, as were in the possession of their wards: not the future possibility of a greater estate, which could at that time be acquired only by suffering a common recovery. It was the life estate of the tenant in tail that the statute intended should stand charged with the payment of his debts; and it ought not by implication to be extended further.

There might be strong reasons to induce the legislature to permit the tenant in tail to bar those in remainder, if he chose to do it himself; yet not to deligate that authority to a guardian. This latter might have an interest to dock the entail, when in fact his ward, if of sound mind, would be averse to it: because, for instance, if the estate were changed into money, the course of descent would be altered, and instead of the estates going according to the intent of the donor, and the desire of the ward, it would go to the next of kin, who would be frequently, if not always, the guardian himself, as was the case here.

The opinion of the court was afterwards delivered by

PARSONS, C. J. This is a *formedon in remainder*, on the gift of *Mary Williams* to *George Baker* in fee tail, remainder to *Zebediah Williams*, the ancestor of the demandants, in fee, after the death of *George Baker* without issue.

The parties have submitted the cause to the court upon a case agreed, on which two questions arise.

The first is, whether the gift to *George Baker* was in tail, or an executory devise in fee. The gift is a devise by *Mary Williams* in her last will. An estate tail is so clearly created by express words, that there is no room for construction; and we are satisfied that the devisee, *George Baker*, took an estate tail, remainder in fee to the ancestor of the demandants.

The second question arises on the effect of the conveyance of the demanded tenements by *George Baker*, father of the tenant in tail, to the tenants.

It appears from the case that the tenant in tail had become *non compos mentis:* that his father had been duly appointed his guardian, and had, in due form of law, obtained a license from the supreme judicial court to sell these tenements for the payment of the debts due from the *non compos.* And it is very properly admitted by the parties, that pursuant to the statute of 1733, c. 38, § 5. the tenements, if the *non compos* had been seized of them in fee simple, would have passed to the tenants by the deed of the guardian.

But it is contended by the demandants, that the guardian was not authorized by law to sell the estate tail of his *non compos mentis* ward for the payment of his debts.

The authority of the guardian to sell these lands must depend upon the construction of the statute of 1791, c. 60. By the first section of this statute, tenant in tail may, by a deed for good and valuable consideration, sell his estate tail, to be holden by the purchaser in fee simple. By the second section, it is declared that all estates tail shall be liable and subject to the payment of the debts of the tenant in tail, *in the same way and manner* other estates are subject and liable, as well after his decease as in his life.

The estates in fee simple of any person *non compos mentis* may lawfully be sold for the payment of his debts by his guardian. In this way and manner, the estates of any person *non compos mentis* are liable and subject to the payment of his debts in his life: and this second section enacts that estates tail shall be liable and subject to the debts of the tenant in tail, in the same way and manner as his estates in fee simple in his life.

The conclusion is irresistible, that a guardian of a person *non compos mentis* may, on being duly licensed therefor, lawfully sell in fee simple the estate tail of his ward during his life for the payment of his debts, and that the estate tail is by such sale extinguished, and the remainders legally barred.

The demandants must therefore be nonsuit.

MARY WORTHINGTON AND AL. EXECUTORS,

versus

ASA HYLYER AND OTHERS.

When the description of an estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree to every particular of the description: but if the description be sufficient to ascertain the estate intended to be conveyed although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected.

THIS was a writ of entry brought in the county of *Berkshire* by the demandants, executors of the last will of *John Worthington*, Esq. deceased, upon a mortgage deed made by one *Azariah Ashley* to the testator of the demandants, for securing to him the payment of 100*l.* due to him from *Ashley*, according to a promissory note mentioned and described in the condition of the deed.

Upon not guilty pleaded, the cause was tried before *Sewall*, *J.* at *Lenox*, September term, 1806, and a verdict found for the tenants, subject to the opinion of the court upon the report of the judge, who sat on the trial, which was as follows.

"The evidence for the demandants in this case was a deed dated April 15, 1786, to *John Worthington*, the demandants' testator, conveying "all that my farm of land in "said *Washington*, on which I now dwell, being Lot No. 17 "in the first division of lands there, containing 100 acres, "with my dwelling house and barn thereon standing, bound-"ing west on land of *Joseph Chaple*, northerly by a pond, "easterly by Lot No. 18, and southerly by Lot No. 19 "having a highway through it."

Also the testimony of *John Lancton* and *Zenas Noble*, by whom the following facts were proved, *viz.* that from 1782, to the date of the mortgage deed, and afterwards, *Azariah Ashley* lived in a house upon the easterly side of the county road, where the defendant *Hylyer* now lives, upon a tract of land latterly known by the name of *the Hylyer farm*, but formerly by the name of *Granger's Grant:* that opposite to this tract, and separated from it only by the county road, lies a tract of land distinguished and known as Lot No. 18, and adjoining to that further west is another tract distinguished and known as No. 17 in the devision of said township by the proprietors: that these three adjoining tracts of land, excepting the separation by the county road were, at the date of the mortgage deed declared on, the property and in the occupation of the said *Ashley:* that the said Lot No. 17, is bounded westerly on lands of *Chaple*, northerly

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by a pond, easterly by Lot No. 18, and southerly by Lot No. 19: that in 1786, there was no road through No. 17, excepting a foot path, in which the neighbours were accustomed to travel; that 16 or 17 years since a town road had been laid out and established through No. 17: that some part of No. 17 had been cleared before the year 1780; but that no improvements have been made upon it since that time: that a great part of it is unimproveable, and of no value but for rocks and sand: and that this lot was not worth in 1786 one dollar per acre, and is not at this time worth more than one dollar and fifty cents per acre.

The parties agreed that, at the time the said deed was executed, *John Worthington* the grantee lived at *Springfield*, in the county of *Hampshire*, that the deed was executed there, and is in his had writing.

The tenants, on their part, gave in evidence a deed by *Azariah Ashley*, dated September 6, 1793, acknowledged and recorded the same day, by which, for the consideration of 300*l.* as therein expressed, he conveyed to *Israel* and *William Ashley* in fee simple a tract of land, part of a tract granted to *Daniel Granger*, and is that part on which the dwelling house of the said *Azariah* then stood. And it appeared from the testimony further adduced in the case, and from the admission of the parties, that the said *Israel* and *William*, two of the defendants, were the cousins of the said *Azariah*, and that the said *Hylyer*, the other defendant is the tenant of the said *Israel* and *William* upon the premises conveyed to them by the deed last mentioned, being the same dwelling house and farm occupied by the said *Azariah* on the 15th of April, 1786, and described by the demandants in their writ.

The demandants offered to shew further by testimony that *Azariah Ashley*, in his lifetime, declared that the consideration of the said deed to the said *Israel* and *William* was not 300*l.* as therein expressed, but 100*l.* only. The judge refused to admit that evidence, and directed the jury to find a verdict for the tenants, which was taken subject to the opinion of the court as aforesaid. And it was agreed that if it should be their opinion that the demandants ought

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to recover the demanded premises in this action, the verdict should be set aside, and a verdict entered for the demandants, or a new trial granted, as the court should order.*

The action stood continued to the last September term in *Berkshire*, and from thence was continued *nisi*. In the interim the counsel submitted their arguments in writing to the court, to the following effect.

Williams, of counsel for the tenants. The demandants claim in their writ a tract of land heretofore known as *Granger's Grant*. But their action is founded on a mortgage deed conveying to their testator the lot numbered 17 in the first division, the boundaries of which are particularly and correctly described in the deed: and these boundaries are such as cannot be removed or changed, and as to one of them especially, *viz.* the pond on the north side of the lot, it is impossible to be mistaken. The lot conveyed is described as containing 100 acres of land.

To construe this deed so as to enable the demandants to recover, we are compelled to adopt several circumstances entirely repugnant to the deed. The demandants claim, by their construction, the whole farm, consisting of three lots of 100 acres each: this is repugnant to the deed, for that conveys but one lot consisting but of 100 acres. They claim

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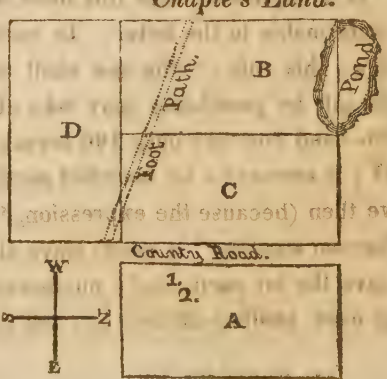
* *The following is a rough sketch of the situation of the several Lots mentioned in this report.*



A. The demanded premises or Granger's Grant.

B. Lot No. 17.

C. Lot No. 18.

D. Lot No. 19.

1. 2. Dwelling-House and Barn.

the *Granger Grant:* The deed gives Lot No. 17 *in the first division* of lands there, and it gives no more, because it states in what manner Lot No. 17 is bounded. The lot conveyed by the deed is not the *Granger Grant*, for that is not bounded by a single descriptive boundary set out in the deed. The land described in the deed is a known lot "in the first division of lands there," and lying west of Lot No. 18, and north of No. 19, bounded on the west by *Joseph Chaple's* land, and on the north by a pond.

But the demandants may say that the deed conveys "all that my farm." To this we answer, that this must be understood as *all that part of my farm;* For it is in evidence that the grantor owned three lots, making 300 acres; and as the deed conveys only 100 acres, it can be held to convey a part only, and not the whole of the farm. It also precisely designates that part to be Lot No. 17, and that only, for it fixes the boundaries on every side.

The demandants may rely on the expression in the deed, "that my farm, *on which I now dwell.*" Still we say it can mean nothing more than that part of the farm particularly described, on which farm the grantor dwelt. They may rely too on the expression in the deed "*with my dwelling-house and barn thereon,*" but this we contend too is but descriptive of the whole farm, a part of which was conveyed. The demandants' testator was a very eminent lawyer, and well knew that a grant of land conveys all the buildings upon the land; and that a grant of buildings does not affect the conveyance of the land on which they stand.

It is impossible that this deed should take effect exactly conformable to the letter. In such a case lord *Coke* lays down this rule: "the law shall make such construction as the gift by possibility may take effect" (1). The letter of this deed conveys only 100 acres; it conveys only Lot No. 17; it conveys a lot bounded northwardly on a pond. Must we then (because the expression, "with my house and barn thereon standing" is used) leave all the known boundaries, leave the lot particularly numbered, and passing from that go over another distinct lot, and say the land conveyed is

(1) *Co. Lit.* 183, *b.*

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the *Granger Grant*, which lies east, instead of west of No. 18, and is no part of "the first division of lands there," but was always before, and at the time of the execution of this deed known by this appropriate name? Shall it be still further said that not only this lot called *Granger's Grant*, of 100 acres, is conveyed, but two other lots also containing other 200 acres, although the deed expressly describes the land granted as consisting of 100 acres only, and that lying west of one of those other lots?

The registry of deeds, as required by our laws, is not merely for the security of the parties; for the operation of a deed is the same, as respects the grantor and grantee, whether it is recorded or not. The principal object contemplated by the law is the security of after purchasers. Hence it may be argued that the present tenants are entitled to a protection in their purchase, which the original mortgagor perhaps could not claim. Before that purchase they, as prudent men, examined the records of deeds: they there found this deed conveying 100 acres, described as Lot No. 17, bounded by known and immutable boundaries, and lying *west* of Lot No. 18. They could never imagine that by any construction this deed would be held to pass the *Granger Grant* lying *east* of Lot No. 18, and they thereupon became the purchasers.

As to the evidence given of the value of Lot No. 17, we consider it wholly irrelevant, and think that it can have no operation in the decision of this question. Had the value of that lot been at this day 1200 dollars, and that of the *Granger Grant* but 150 dollars, we should never have heard of this action; nor would the court have been called on to countenance a construction, which changes the lot described in the deed into a tract admitting of no part of the boundaries contained in the deed, and lying east instead of west of a third well known tract of land: a construction which if adopted, will make it inexpedient for any one hereafter, who may be treating for the purchase of an estate, to rely on the records, in order to ascertain whether such estate is or is not included in a prior conveyance.

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Ashman for the demandants. The case stands exactly as if the parties to the action were *Worthington*, the mortgagee and *Ashley* the mortgagor. The latter, having undertaken to mortgage to the former, cannot defeat the title under the mortgage. The rules of construction, applicable to deeds and grants, cannot be varied for the convenience or interest of parties. Did *Ashley* convey the demanded premises to *Worthington?* The law will answer this question by applying its rules of construction to the deed produced, without enquiring who are the parties that ask it. The effect and operation of the deed must be determined from the deed itself, the contents of which were as well known through the records to the present tenants as to the original parties.

To say that the tenants are in a better situation than *Ashley* himself would have been in, admits that *Ashley* conveyed the land; since in a case like this there is no middle ground between conveying and not conveying. If *Ashley's* mortgage did convey this land as against himself, it did also as against the tenants, and they can have acquired, by their subsequent deed nothing more than *Ashley's* right of redemption. If the first deed did not convey this land, the demandants could not support this action against the tenants, who were in possession: and if it did so convey, the tenants could not avail themselves, by producing a deed of subsequent date and registry. It would be contrary to justice and common sense, as well as law, to permit a man, by his own act, by first using ambiguous language, and then conveying again, to defeat his own grant(2): and it would be equally absurd to permit subsequent purchasers to avail themselves of that act, by shewing their own ignorance or negligence. Nor is there any hardship in their case, since they have their remedy against the person, whose deed they chose to take under such circumstances. No case is recollected in the books, in which it has even been advanced by counsel, much less held by the court, that a subsequent adversary purchaser stands in a better situation than a first, when the title to an estate rested on the construction of a deed.

(2) *Com. Dig. Grant, F.*

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Had the deed in this case purported an absolute conveyance, the consideration *expressed* might have been different from the *true* one, and it could not have appeared to the court that Lot No. 17, was not worth the money actually paid. But here the deed, and the note which accompanies it, shew conclusively the money paid, and the evidence was that this sum exceeded the value of that lot more than two thirds.—This fact will aid in ascertaining the intent of the parties to the deed. That intent was to secure the payment of the money mentioned in the condition of the mortgage. No. 17 was inadequate; the grantor had other lands adjoining, which are mentioned, if not granted in the deed. The "dwelling-house and barn [were] thereon standing." These words could not be introduced to aid in describing Lot No. 17, for the house and barn were on another lot. Why not pledge this other lot together with No. 17, when the mortgagor could at any moment, by paying the debt, redeem the whole?

But if this deed is ro receive the same construction as if it were an unconditional one, still we contend that the demanded premises passed by it.

Grants are to be construed according to the intention of the parties; and if there appears to be any doubt or repugnancy in the words, such construction is to be made, as is most strong against the grantor, because he is presumed to have received a valuable consideration for what he parts with(3). And this intention is to be collected from the deed(4).

What then appears to have been the intention of the parties to this deed? It does not lie in the mouth of these tenants to say that *Ashley* intended to make the mortgagee *believe* that he was receiving the *whole farm* for his security, while only a *part*, and that of small comparative value, was conveyed. If he is to be considered as acting *honestly*, he intended to convey the whole. If no *trick* was designed to be practised, it is apparent that what follows "all that my farm on which I now dwell," was intended as merely descriptive of what was before granted, which was *all the farm*

(3) 2. *Bac. Abr.* 665.
(4) *Cowp.* 9. *Moore* vs. *Magrath.*—1. *Mass. Rep.* 223. *Bridge* vs. *Wellington.* 2. *Bac. Abr.* 660.

on which the grantor dwelt. Now whether this description is true or false is immaterial. That a part of it is false, if the tenants are permitted to shew it, there can be no question; but the most important part of it is true. It was false, (if such is the language of the deed), that the farm consisted wholly of No. 17. But the deed immediately goes on, "with my dwelling-house and barn thereon," (*i. e.* on the thing granted, the "farm") standing. This part of the description is true, and cannot mislead. A man might not know the number of his lot, upon whose land it abutted, or the number of acres it contained, but he could not mistake his dwelling house and barn for any thing else in existence. Of the same nature is the clause in the description, "having a highway through it," *i. e.* through the same "farm." It is both true and distinguishing, and well calculated to ascertain the thing intended to be granted beyond a doubt. A highway is a very distinct thing from such a foot path as we find on Lot No. 17. There can then remain no doubt that the whole farm was included in the mortgage, unless from the expression which follows the grant of the farm, "being Lot No. 17." For all that comes after this, which is not truly and correctly referable to the *whole* farm, to take it most favourably for the tenants, is but descriptive of that lot. But that lot was before sufficiently described as No. 17 in the first division." The farm is the thing expressly granted and the mistake or falsehood in the subsequent description of it cannot effect the grant. This principle is laid down in all the authorities(5).

The case at bar is very distinguishable from *Doddington's case*(6). That was a grant of "*omnia illa messuagia, &c. in tenuris J. B. & al. scituat. in civitate W.*" and in truth the lands were situate in D. There were no lands in W. to which place the grant was restrained, for the grant to operate upon. And that case was said to be the stronger by reason of the pronoun *illa*, which was not satisfied until the sentence was ended. Here it is otherwise: for if the question be asked what is meant by "all that farm," the grantor immediately

(5) *Com. Dig. Tit. Deed*, E. 4. *Grant* E. 13.—3. *Rep.* 10. *Dowties case.* 2. *Bac. Abr. Grant*, H.

(6) 2. *Rep.* 32.

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answers, "it is the one on *which* I now dwell;" and the report shews that the demanded premises are a part of that farm,

All the parts of the description in the deed cannot be true, whether the whole farm is conveyed or only Lot No. 17. But the boundaries given apply as well to the whole farm as to No. 17, except where it is said "easterly on Lot No. 18," and if we consider this a mistake, it will be the only circumstance (for the *quantity* of the land may be laid out of the case (7) in the whole description, which may not consist with the idea that the whole farm was granted, except its being called by the grantor Lot No. 17. And the court will give such construction to the deed, as will best reconcile its several parts, and effectuate the honest intention of the parties.

The word "being," which is said to connect the former and latter part of the description in this deed, cannot have more force than a *videlicet*, which destroys the grant, and which in such case would be void, being repugnant to the thing first granted (8). Thus in the case of *Stukely* vs. *Butler* (9) where S. bargained and sold "*omnia illa boscos, subboscos*, &c. then standing, growing, and being upon the whole of his manor of *Cleave, viz*, upon, &c, mentioning five groves by name; the *viz.* was held to be utterly void. The same rule is applied in pleading.

The case of *Conolly* vs. *Vernon & al.* (10), though not directly in point, fully recognizes the principles necessary to support the present action. It is there expressly laid down, that "when there is a grant of a particular thing, once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it, will not frustrate the grant."

The tenants in this case are not aided in their construction by Lot No. 17 being a part of the farm on which *Ashley* dwelt. If they would add words to diminish from the grant, and read "all *that part* of my farm," &c. yet the phrase "with my dwelling house and barn thereon standing" is so coupled with the preceding matter, as to make the addition

(7) *Com. Dig. Fait.* E. 4.
(8) *Bac. Abr. Grant*, I.
(9) *Hob.* 168.
(10) 5 *East.* 51.

absurd; because those buildings did not stand on Lot No. 17, as this interpolation would make them.

And now at this term the opinion of the court was thus delivered by

PARSONS, C. J. [After a brief abstract of the facts reported by the judge.] If the description in a conveyance be so uncertain, that it cannot be known what estate was intended, the conveyance is void. But in a deed poll, where there is a doubt, the construction must be against the grantor; and every deed ought to be so construed, if it can, that the intent of the parties may prevail, and not be defeated.

It seems to be a general rule, that when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every particular of the description. Thus if a man grant all his estate in his own occupation in the town of W. no estate can pass, except what is in his own occupation, and is also situate in that town.

But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. Thus if a man convey his house in D. which was formerly R. C.'s when it was not R. C.'s but T. C.'s, the house in D. shall pass, if the grantor had but one house in D. because by the description of his house in D. the estate intended to be conveyed is sufficiently ascertained.

Let us apply these rules to the case before us. The mortgagor has described, as the estate to be conveyed, *all that his farm of land in* Washington, *on which he then lived, containing one hundred acres, with his dwelling house and barn thereon standing.* This description is sufficient to ascertain the estate intended to be conveyed; and if no other particulars were inserted, there could be no doubt. But he adds that the farm, on which he lived, was *the Lot No.* 17, *in the first division of lands there*, and included within certain limits mentioned. The limits of this lot are truly described, but in fact the farm, on which he

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lived, was not No. 17, but a different parcel of land. By the rule then this particular of the description is to be rejected, because without it the description is sufficiently certain; and because, if it be considered as an essential part of the description, the deed will be void. For by no construction can Lot No. 17 be considered as conveyed, to the exclusion of the farm, as the lot is mentioned as descriptive of the farm, and not the farm as descriptive of the lot. Indeed rather than the deed should be deemed void, a construction ought to be adopted, on which both the farm and the lot should be conveyed; for a farm, on which the mortgagor then lived, is certainly intended to be conveyed; and the lot is also bounded as descriptive of, and may therefore be considered as a part of the premises.

But on the first ground we are satisfied, that the description of the farm by a false reference to the lot must be rejected, because without that description the farm is sufficiently ascertained.

Let the verdict be set aside, and a general verdict that the said *Hylyer* is guilty in manner and form as the plaintiffs have declared against him be entered. Judgment for the demandants must be rendered as on a mortgage.

JACOB SEBOR

versus

WILLIAM ARMSTRONG AND THOMAS L. WINTHROP HIS TRUSTEE.

If one summoned as trustee in a foreign attachment, declares that he has accepted a draught in favour of the principal, which *he thinks* was payable to order, he will be adjudged trustee, having funds to respond the draught.

THE only question in this action was, whether Mr. *Winthrop* should be adjudged the trustee of the defendant *Armstrong* upon the following disclosure made by him at the common pleas in July last.

"And now the said *Thomas L. Winthrop*, in his own proper person, cometh into court, and for answer to the plaintiff's writ aforesaid saith, that before the month of Jan-

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uary, 1800, Mess. *George Storer* and *Charles Bulfinch* were indebted to *Benjamin Winthrop*, of *New-York*, Esquire, in a large sum of money, which debt was committed to me to collect; and I received of the said *Storer* and *Bulfinch*, before the said month of January, 1800, a note of hand signed by *Henry Knox*, and endorsed by *Henry Jackson* and *Benjamin Lincoln*, as collateral security for the payment of the said *Benjamin Winthrop's* demand against the said *Storer* and *Bulfinch*, and also to secure a demand, which the said *Sebor* had against them the said *Storer* and *Bulfinch*.—Afterwards the said *Benjamin Winthrop* drew an order on me, in favour of the said *Armstrong*, for 1800 dollars, requesting me to pay it to the said *Armstrong* (and I think to his order) out of any money I might receive of said *Storer* and *Bulfinch*, or said *Knox's* note, which was endorsed as aforesaid; which order in the month of January, 1800, I accepted to pay conditionally, *viz.* when in cash from those persons. I further say that I instituted a suit against the said *Knox*, *Jackson* and *Lincoln*, and at the supreme judicial court in March last I recovered judgment against the said *Jackson* and *Lincoln* for the sum of 7853 dollars 41 cents damage, and costs of suit, which have been paid me; so that in that way I have finally obtained payment of the said debt, which was lodged with me by the said *Storer* and *Bulfinch*, as collateral security as aforesaid. I have paid said *Sebor* his part thereof, and to *Benjamin Winthrop* his part thereof, reserving from his said part sufficient to respond the said order in favour of *Armstrong;* and whether I am trustee or not is submitted to the court."

Per curiam. We are called upon to decide if Mr. *Winthrop* shall, upon the facts disclosed by him on his examination, be adjudged the trustee of *Armstrong*.

By the third section of the statute of 1794, c. 65. which gives this process, any person summoned as a trustee shall be so adjudged, unless he declare on oath that he had no goods, effects or credits of the principal, when the writ was served on him.

By the twelfth section it is provided, among other things, that no person shall be adjudged a trustee, on account of his having accepted any negotiable security.

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Mr. *Winthrop*, on his examination, declares that he had accepted a draught on him from one B. W. in favour of *Armstrong* the principal, for 1800 dollars; and that when the writ was served on him he had not paid that draught, but had sufficient funds of B. W.'s in his hands. On this declaration there is no doubt but Mr. *Winthrop* is the trustee of *Armstrong*, he owing him 1800 dollars on an accepted draught. But in this declaration he adds that *he thinks* the draught was payable to *Armstrong or his order*. If the accepted draught was negotiable, Mr. *Winthrop* is protected by the twelfth section of the act above cited. But he must be positive as to this fact. He has had time to enquire, and he does not move the court for leave to make any further declaration on this point. If the trustee, in whose knowledge the fact ought to be, is doubtful, the court cannot make any presumption in his favour.

Mr. *Winthrop* must be adjudged the trustee of *Armstrong*.

THOMAS DAWES, JUDGE, &c.

versus

JAMES SWAN AND OTHERS.

In the construction of a will, the court will give effect to all the words, without rejecting or controuling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intention of the testator.

But if a latter clause is repugnant to a former one, the latter must prevail, because it is the last determination of the testator: unless the apparent intention of the testator in other parts of the will leads to a different conclusion.

A legacy payable on a certain event does not carry interest, whether it be vested absolutely or on a contingency: except where it is bequeathed to a minor, whom the testator was under a moral obligation to support, and for whom no support is provided until the legacy is payable.

A legacy was given to A. B. to be paid to him on his attaining the age of 21 years: There was also a general direction that all the legacies should be paid with interest in three months from the testator's decease: It was holden that it was not the testator's intent to limit a time of payment of any of the legacies, but only to provide that they should be paid with interest, and to fix a time when the interest should commence.

THIS was an action of debt on a bond to the judge of probate, conditioned that the defendant *Swan* should faithfully execute the last will of *William Dennie*, pay all debts and legacies, &c. The suit was instituted for the benefit of *Samuel Clarke*, a legatee named in the will.

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The defendants were defaulted, and upon a hearing in chancery, the only question made to the court was whether the said legatee was entitled to recover interest on his legacy.

The cause was strenuously argued by *Gore* and the *solicitor general* for the plaintiff, and *Dexter* and *Otis* for the defendants; but as there was a final difference of opinion in the court, and as the chief justice in delivering the opinion of the court, and the judge, who dissented therefrom, went much at large into the question in support of the respective opinions, it is thought unnecessary to recite the arguments at the bar.

The chief justice observing that the court were not unanimously agreed, requested his brother *Sedgwick* to deliver his opinion first, which he did as follows.

SEDGWICK, J. The question is whether the legatee, *Samuel Clarke*, is entitled to interest on his legacy from the death, or from three months after the death of the testator; or whether the interest commenced, in the words of the bequest, on his arriving at the age of twenty-one years?

In this, as in every case of a legacy, we are bound to ascertain, as well as we can, from the whole of the testator's will, in relation to the subject matter of enquiry, what was his intention.

The bequest is expressed in these words; "I give to "*Samuel Clarke*, son of *Samuel Clarke* late of *Boston*, "deceased, 500*l.* sterling, to be paid him on his arriving to "the age of 21 years. If he dies before that time, this "legacy to be void."

I do not determine whether this legacy, technically considered, was contingent; or whether it was vested, as the plaintiff's counsel contended: and to be divested on the death of the legatee before he attained to the age of 21 years. Whatever the construction in this regard may be, if this bequest is to be considered by itself, and uninfluenced by any other part of the will, it is impossible to mistake the intention of the testator. If the legatee died before he attained to 21 years of age, nothing was to be paid, "the legacy was to be void." If he did not, then the legacy was to be paid. A payment therefore of 500*l.* to him, when he was 21 years of age, would exactly and *fully* satisfy the direc-

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tions of the testator's will. As this is the plain and manifest intention of the words, in which the bequest is expressed, and as it is apparent, *from them*, the legatee is not entitled to interest, or the legacy, before he was 21 years of age, the demand that is made for it must, as I apprehended, be clearly supported by a manifest intention, to be discovered in some other part of the will.

It is contended that such intention—an intention that the legacy should carry interest from the death, or from three months after the death of the testator, "till paid," is manifest from an after direction in the will expressed in these words, "I order *all* the above mentioned legacies to be paid "in *silver or gold*, and not in paper money at any rate, or "by any means whatever, *with interest, in three months* "after my decease till paid." It is insisted that this clause of the will gives interest on the legacy to *Samuel Clarke* from three months after the death of the testator.

To determine this, one fact is in my opinion necessary to be recollected and kept in memory, while we are attempting to ascertain the intention of the testator, by the recited direction, as that intention may be discovered, by a consideration of the bequest to *Samuel Clarke*, and by other parts of the will. The fact I mean is that *Samuel Clarke*, at the time of making the will, was not more than four or five years old, and not more than six or seven at the time of the testator's death. Keeping this in our view, let us enquire whether the testator meant, by directing *when and how* "all the above mentioned legacies" should be paid, to charge the legacy to *Samuel Clarke* with interest before he attained to the age of twenty-one years? I believe the true construction of this direction to be, *that it shall attach to all the legacies, in every particular, which does not controul a manifest intention expressed in the bequests themselves; but that in all the particulars where such application would alter or materially vary the bequests themselves, there the direction is not to be applied.* So that we are bound, I apprehend, to apply for the explication of this item of the will, that rule of construction of doubtful or ambiguous words and expressions, by which we are directed to refer hem to the subjects respectively, to which they properly

belong. By means of this rule we may satisfactorily explain and give effect to every part of this will; and without it manifest absurdities and contradictions may be involved.

This direction of the will refers to three subjects. 1. It orders the legacies to be paid in gold or silver: 2. It fixes the time, within which they shall be paid: and 3. It directs that (if not paid within that time as I apprehend) they shall carry interest. Was the intention that all the legacies should, in fact, be paid in *gold and silver:* that they should all be paid *in three months;* that they should all be paid *with interest?* I believe not: but that these directions should be observed in all instances, whereby the manifest intention of the testator, expressed in the bequests themselves, would not be violated. In this view I will consider the direction of the testator, by which interest is supposed to be due on the legacy to *Samuel Clarke*, before he attains to twenty-one years of age, in relation to the bequest itself, and to other parts of the will.

In regard to the bequest to *Samuel Clarke*, was it intended that it should be paid *in three months?* this is impossible; because the testator had expressly declared that it should be paid to him, when he attained to twenty-one years of age, which was sixteen or seventeen years after making the will, and fourteen or fifteen years after the testator's death. No reasonable explanation has been given of these two clauses of the will—the bequest to *Samuel Clarke*, and the direction as to the time and manner of paying the legacies, whereby it can be conceived that it was the intention of the testator that *that* legacy should be paid in three months after his decease. It cannot be believed that the testator, when he wrote or assented to the latter clause, had forgotten *when and how* he had intended his bounty to the legatee should be dispensed. It is difficult to suppose he had altered that intention; or if he had, it cannot be conceived that he would have left it to be determined, after his death, by doubtful construction. It is then impossible to suppose that the testator intended that this legacy should be paid in three months after his death. And I should have thought, but for the weight of the authority against me, that, after an attentive perusal and consideration of the will, it would have been equally impossible to believe

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that it was the intention of the testator that the legacy should carry interest before the legatee attained to twenty-one years of age. If the legatee attained to twenty-one years of age, and *then* 500*l.* were paid him, the will of the testator was completely fulfilled. On that contingency that sum, and no more, was due. If the legatee died before that time, the legacy was void. Apply then the latter item in the will to this legacy, and it is a direction that it shall be paid in gold or silver, and not that it shall be paid *in three months;* nor that it shall carry interest during the infancy of the legatee.

The legacy next preceding that to *Samuel Clarke* is also a legacy to an infant, *Nathaniel Norton.* It is expressly provided that it shall carry interest, and an appropriation of that interest is made, during his infancy, for his support. When in the one case interest is intended, it is expressed: and if intended in the other, why was an expression of that intention omitted? But this, in my opinion, is not all the argument to be drawn from the bequest to *Nathaniel Norton.* It is in these words: "*I give to* Nathaniel Norton, *the boy* "*who now lives with me, whose father was a faithful man* "*in my service many years, 150l. sterling and appoint* "Major James Swan, *my executor hereafter named, to be* "*his guardian, and I order the interest on said sum, till* "*he arrives at the age of twenty-one years, to be appropri-*"*ated for his support.*"

Did the direction in the after part of the will, ordering *all* the legacies to be paid in three months after the death of the testator, include this legacy, and render it payable within that time? It will not be pretended that such was the intention of the testator. It was not the intention of the testator that this legacy should be paid before the legatee was twenty-one years old. And wherefore is this to be the construction? The direction is as explicit that *all* the above mentioned legacies shall be paid *in three months,* as that they shall be paid with interest. The true answer, I believe, is that the testator did not intend that the general direction should violate or vary any preceding manifest expression of his intention, as to the *time* and *manner* of paying the legacies, which he had given.

This direction, then, so far as it respects the legacy to *Nathaniel Norton,* does nothing more than secure the pay-

ment in gold or silver. And this construction will be further illustrated and enforced by a consideration of other parts of the will.

The legacy next succeeding that to *Samuel Clarke* is to the testators nephew, *John Merchant*. He gives him 4000*l*. sterling, and orders him to be accountable to his executor for whatever he shall be indebted to him at the time of his decease. Here the legacy given is 4000*l*. sterling. The direction is that *all* his legacies shall be paid in gold or silver, in three months, with interest. Was the intention *here*, that these 4000*l*. should be paid in gold or silver, in three mouths, with interest? No. The manifest intention of the testator was that the legacy should form an item of credit to its amount: and if so was the fact, that after computing this credit nothing would be due to the legatee, then no part of the legacy was to be *paid:* and in no event more than the balance, which the legacy would create. Thus there is another instance, in which the manifest intention of the testator would be violated by the application of the direction of paying *all* the legacies in the time and manner expressed in the direction, which is supposed to controul in the case of the legacy to *Samuel Clarke*.

There is another instance, in which to give so extensive an application of the direction in the will, as is contended for in the case of the legacy to *Samuel Clarke*, would most clearly, as I apprehend, contravene the manifest intention of the will. The testator gives to his brother *Thomas Dennie*, 10*l*. sterling, to be deducted out of what he might be indebted to him at the time of his death. Which debt he declared he did not mean to remit by that legacy; but on the contrary he ordered his executor to call for, demand and receive it. *Here* it was the *expectation* of the testator, that after deducting the 10*l*. legacy given, there would remain a balance due from the legatee; and it was his intention that *that balance* should be paid. It was not therefore his *intention*, that the legacy should be paid in *gold or silver*, nor in any other way than by deducting it from the debt due to the testator.

There are then three instances, besides that of the legacy to *Samuel Clarke*, in which the direction in the will, to pay all the above mentioned legacies *in gold or silver, in three*

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months, with interest, could not apply—that of the legacy to *Nathaniel Norton,* in which the money was to be paid when he arrived at the age of twenty one years; a period much beyond three months:—that to *John Merchant,* where the testator might expect that nothing was, in fact, ever to be paid:—and that to *Thomas Dennie,* where the legacy is expressly to be discharged, not in *gold or silver,* but by deducting it from a debt due to the testator. All these are included among "*the above mentioned legacies:*" and in neither of them is the intention of the testator more clearly, in my opinion, opposed to the meaning of the testator expressed in the general direction as to the time and manner of paying the legacies, than in that of the legacy to *Samuel Clarke.*

A consistent construction of the will cannot, that I can perceive, be made in any way, but that which I have already mentioned: that the order of the testator, as to the time and manner of payment, was not to be extended so, as to comprehend any legacies, which were, by manifest intention, to be discharged otherwise than expressed in that order.

The opinion of the court was then delivered as follows by *PARSONS, C. J.* This bond is sued for the benefit of *Samuel Clarke,* one of the legatees in the testament of *William Dennie,* deceased. The condition of the bond is to secure the payment of all the legacies: and the penalty being forfeited, the parties have been heard in equity upon the sum justly due to *Samuel Clarke* the legatee for his legacy. And the question before the court is, whether, under the testament of *William Dennie,* the legatee is entitled to receive his legacy, with interest after the expiration of three months from the testator's death, or only from the time when the legacy was payable.

The testator bequeaths pecuniary legacies to five of his friends; also twenty shillings sterling to his sister, and ten shillings sterling to each of his nephews, nieces, cousins, and other relations not mentioned in his will.

He bequeaths to his nephew *John Merchant* 4000*l.* ordering him to account with his executor for whatever he should be indebted to the testator at his decease. And also to his brother *Thomas Dennie* 10*l.* to be deducted out of what

his brother might owe the testator at his death. And to his brother *Joseph Dennie* he gives 1500*l.* and discharges him from what he may owe the testator at his death.

The testator also gives to *Nathaniel Norton* a minor, 150*l.* appoints the executor his guardian, and orders the interest of this legacy until the minor arrives at twenty one years of age to be appropriated for his support. He then gives to his nephew, *Samuel Clarke*, for whose use this suit is commenced 500*l.* to be paid him on his attaining to the age of twenty one years, and if he die before that time, the legacy to be void.

After a bequest of all these legacies, follows the clause, on which arises the question before the court, which is in these words. "*I order all the aforementioned legacies to be paid in silver and gold, and not in paper money, at any rate or by any means whatever, with interest in three months after my decease till paid.*"

Mrs. *Swan* is made residuary legatee, and her husband one of the defendants, is made the executor. The will was executed on the 16th, of June, 1781, when, or not long before, the currency was paper money, or publick bills of credit.

In the interpretation of a will, it is our duty to give effect to all the words, without rejecting or controuling any of them if it can be done by a reasonable construction, not inconsistent with the manifest intent of the testator.

If there be a latter clause repugnant to a former, so that one must be rejected, the latter clause must prevail; because it is the final determination of the testator; unless the intention of the testator apparent from other parts of the will, leads to a different construction.

The legacy to *Clarke*, independent of the subsequent order, we are satisfied does not carry interest, whether it be considered as vested absolutely or on a contingency. A vested legacy does not carry interest, but from the time when it is payable. This is a general rule, and the exception to it is in the case of a legacy bequeathed to a minor, whom the testator was under a moral obligation to support, and for whom no support was provided until the legacy was payable. In this case the legacy shall carry interest from the death of the testator, because it is presumed that his intention was to fulfil a moral obligation.

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The decision of the question before us must depend on the subsequent order. The legatee insists that his legacy is within the express words of the order, and that by it the interest is to commence in three months from the testator's death. The executor contends that the order does not extend to any legacy, to the payment of which a time had been prescribed, and therefore that the legacies to *Clarke* and to *Norton* are not subject to the order.

The words are "all the afore mentioned legacies," which extend to *Clarke's* legacy, as certainly as if the testator had repeated the legacies expressly mentioning *Clarke's* amongst them. They are to be paid in silver or gold: and no good reason has been, or in my opinion can be assigned, why *Clarke* should not as well as the other legatees, have the benefit of this order as to the mode of paying his legacy.

But it is objected that, upon this construction as to the mode of payment, *Clarke's* legacy will be within the order as to the *time* of payment also, whence the order will be repugnant to the bequest to *Clarke*, in which is an express direction that his legacy is to be paid him at his attaining the age of twenty one years.

If the conclusion be just that *Clarke's* legacy, as to the time of payment is also within the order, why should it not be admitted, and *Clarke* be allowed the benefit of the testator's last determination in his favour? And this admission will have no other effect on the legacy to *Norton*, than to fix the time when it shall begin to carry interest. For the executor being constituted his guardian, the payment must be considered as made the instant the legacy begins to carry interest, as the interest is expressly appropriated to the minor's maintenance.

But we are satisfied that this order may have a reasonable construction, by which every part of the will may have the effect intended by the testator. The words are not *that the legacies are to be paid in three months after the testator's decease, with interest*: but *that the legacies are to be paid with interest in three months after the testator's decease, till paid*. And we are of opinion that by this clause it was not the testator's intention to limit a time of payment of any of the legacies but only to provide that they should be paid with interest, and to fix the time when the interest should commence.

Expressions of this nature are very usual in common parlance, when they are understood, not as fixing a time of payment, but as a direction when the principal shall begin to carry interest; and in this order the testator himself does not contemplate that any of his legacies are in fact to be paid in three months after his decease, because they are to carry interest after that time until paid. He has therefore left the time of payment subject to the directions before given in his will, or where none are given, to the operation of law, by which an executor is not obliged to pay legacies within a year of the testator's death, that time being allowed him to ascertain the amount of the assets in his hands, after the debts are satisfied.

Upon this construction every part of the will has effect, no words whatever are rejected, and all repugnance between the several parts is excluded.

As to the two legacies given to the legatees, who are to pay their debts, immediately on the death of the testator, the legacies, or so much of them as is equal to the debts, must be considered as then paid: and if the legacies exceed the debts, the difference will carry interest from the expiration of three months after the testator's death. Or if the legatees, by payments to the testator, shall owe him nothing at his decease, then their legacies are to carry interest in three months from his decease.

Neither does this construction of the order introduce any repugnancy to the terms of the bequest to *Norton*: for in that bequest no time is limited, when interest on his legacy shall commence.

Upon any other construction we must unnecessarily presume, either that *Clarke's* legacy is to be paid in three months after the testator's death, contrary to the terms of the original bequest, or that the words "*all the legacies afore mentioned*" comprehend not all but only a part of them.

It was accordingly ordered by the court that interest be computed on the legacy to *Samuel Clarke* from the expiration of three months after the testator's death, and that execution issue accordingly.

DAVID WILCOX *versus* JOSIAH MILLS.

If one summoned as trustee in a foreign attachment out of his own county, he being the only trustee summoned, appear to the writ and move to stay the proceedings against him as trustee, or pray judgment whether he shall be holden, he will be discharged as of course, and will be entitled to costs, and perhaps to extra costs within the equity of the statute.

If he does not appear, but is defaulted upon the original process, he cannot plead the same matter in abatement to the *scire facias*, but must submit to an examination: He cannot still be charged beyond the value of the effects in his hands at the time of the first attachment. But if it appears that he had no effects at that time he will not be held to pay costs; but will recover costs, because sued out of his county.

THIS was a *scire facias* against *Mills*, an inhabitant of *Worthington* in the county of Hampshire, who had been summoned in a previous process of foreign attachment as the trustee of a debtor of the plaintiff *Wilcox*. The former process, as well as the present *scire facias*, were brought in the county of *Worcester*, *Mills* being the only person summoned as trustee. The object of the present suit was to obtain execution against the estate and body of *Mills* to satisfy the judgment which the plaintiff had recovered against the goods and effects of the original debtor in the hands of *Mills*.

To this *scire facias* the defendant pleaded in abatement as follows:

"And the said *Josiah Mills* comes when, &c. and prays judgment of the plaintiff's writ and declaration, and says that at the time of suing out and service of the original process therein mentioned, and also at the time of suing out and service of the said *scire facias*, he was, and ever since has been an inhabitant of, and dwelt within the town of *Worthington* in the county of *Hampshire*; and was not, and never has been an inhabitant of, or dwelt in the county of *Worcester* aforesaid; and that he is the only trustee named in the said process: wherefore he prays judgment of the said and declaration, and that the same may be quashed."

To this plea the plaintiff demurred generally and the defendant joined in demurrer.

At the last September term at *Worcester*, *F. Blake* for the defendant, cited stat. 1794, c. 65. § 1. "when the trustees, named in such writ, do all dwell in one county, such writ shall be made returnable in the county where all the trustees dwell." The only question, which can be made, is whether the defendant, having suffered himself to be defaulted upon the original process, is now too late to avail himself of this provision. But it seems very clear that the court in *Worcester* had no jurisdiction of the cause upon the original

writ, and consequently cannot take cognizance of this *scire facias*, brought merely in aid of the original process. The whole proceedings are *coram non judice*, like a common personal action brought in a county, where neither of the parties dwell, or a real action instituted in a county other than that wherein the land lies(1). The case here is stronger than that of *Williams* vs. *Blunt*(2), for there the parties had pleaded to the merits, yet the court dismissed the suit for want of jurisdiction: In our case there was no appearance of the trustee in the original suit, but a default only.

Bigelow, for the plaintiff, insisted that this matter ought to have been pleaded to the former process. It was unreasonable that the defendant should lie by until this period, and now, after the plaintiff has been put to so much expense in prosecution of his claim, come in with a plea that has no relation to the merits, and if available at any stage was certainly so upon the original writ. By appearing and imparling to the first writ, the defendant has acknowledged the jurisdiction of the court and waived his right to this objection.

By statute of 1784, c. 28. § 13. all personal actions are to be brought in the county where one of the parties live, if they both live within the commonwealth; and when an action shall be commenced in any other county, the writ shall abate, and the defendant be allowed double costs. But if the defendant will appear to such action, without pleading such matter in abatement, and afterwards be defaulted, he cannot take advantage of the provision made for his benefit alone, but will be held to have waived it.

The cause stood continued *nisi* for the opinion of the court, which was delivered at this term by

PARSONS, C. J. *Wilcox* having sued out a writ against his debtor returnable in the county of *Worcester*, and by the writ having attached the effects of his debtor in the hands of *Mills*, an inhabitant of another county, he being the only trustee summoned, the plaintiff recovered judgment

(1) *Frumpton* vs. *Pettis*. 2 *Lev.* 23. cited *ante vol.* 2. 122.
(2) *Ante vol.* 2. 207.

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for his debt, and had execution awarded against the effects of his debtor in the hands of *Mills*. The execution being returned unsatisfied, *Wilcox* sues this *scire facias* against *Mills*, to have execution against his own body, goods and estate to the value of the effects attached. To the *scire facias*, *Mills* pleads in abatement, that he is the only trustee, who was summoned by the original writ, and that he was not an inhabitant of the county of *Worcester*, where the writ was returned, but of the county of *Hampshire*. To this plea there is a demurrer and joinder.

Mills, to support his plea, relies on the express words of the statute, that when all the trustees live in one county, the writ shall be returnable in that county.

If *Mills* had appeared to the original writ, and moved to stay all proceedings against him as trustee, or if he had prayed judgment whether he should be holden to answer, he would have been discharged as of course, and he would have been entitled to his legal costs, and perhaps to such further costs as would compensate him for his time and expenses, within the equity of the third section of the statute; because it would appear that he was not holden to answer as trustee to the plaintiff's writ. But he lies by, until after execution is awarded against the effects of the debtor in his hands, and he now pleads these matters in abatement of the *scire facias*.

It is a very reasonable rule of law, that a *scire facias* to have execution must follow the original judgment, and that the defendant can plead nothing to the *scire facias*, which he might have pleaded on the original writ. On these principles the defendant now comes too late, and his plea cannot avail him. He must submit to an examination, and he cannot be charged beyond the value of the effects he confesses to have had, when the original writ was served. But if it appears on his examination that he had no effects, he will not in that case be adjudged to pay any costs, but shall recover costs, because he is not resident in the county where the writ was returned.

Judgment must be rendered, that the plea is bad, and that the said *Mills* answer further, &c.

SAMUEL A. DORR

versus

THE NEW-ENGLAND MARINE INSURANCE COMPANY.

Whether the obligations and rights of the parties to a policy of insurance, are determined by the actual state of the fact, or of the intelligence received, at the time of an offer to abandon, *quære.*

THIS was an action of the case upon a policy of insurance, by which the defendants caused the plaintiff to be insured 12,309 dollars on a quantity of teas on board the ship *Radius*, at and from *New-York* to *Bremen*, against the usual perils. The plaintiff demands damages as for a total loss.

The cause came before the court on a case stated, in which it was agreed, that the policy was effected, as alleged by the plaintiff: that he was interested in the teas to the amount insured: that the ship sailed, on the voyage insured with the teas on board on freight, March 16th, 1806, and on the 28th of April following was captured by a *British* armed ship, sent into *England*, and there libelled as prize in the high court of admiralty: that on the 20th of May following a restoration of the ship was decreed to the master: that the cargo was unladen, and on the 16th of June following the said teas were decreed to be restored to *Thomas Wilson* the claimant, who on the 22d of the same June received them in behalf of the owner, or of whomsoever it might concern, he being decreed to pay a certain proportion of the captor's expences, and also to give security to pay the master the freight of said teas, if the same should be decreed to him, which was afterwards done, and the freight paid him by *Wilson:* that afterwards on the 18th day of July, 1806, the plaintiff, having received intelligence of the said capture and detention, immediately offered to abandon his interest in the teas to the defendants, who refused to accept the same, the decree of restoration not being known to either of the parties, until after the 23d of September in the same year, on which day this action was commenced: that *Wilson* was the plaintiff's correspondent in *London*, and about the 19th of May aforesaid had received advice from the plaintiff of the shipment of the teas to *Bremen*, and that when sold there, the nett proceeds would be remitted to him; but he had no authority or direction from the plaintiff to claim or dispose of the teas; but concluding it would be most for the plaint-

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iff's interest, and the former master refusing to take them on board, he shipped them on board a *Swedish* ship for *Bremen* on the 28th of July following: that the teas arrived safe at *Bremen*, were there sold, and the proceeds remitted to *Wilson*, who now holds them for the use of those to whom they may belong.

If the court should be of opinion that the plaintiff is entitled, upon these facts, to recover for a total loss, the defendants agreed to be defaulted, and that judgment be rendered for the plaintiff for the amount thereof with interest from the 13th of September, 1806, and costs, deducting the premium, and one per cent. as agreed in the policy: if the court should be of opinion that the plaintiff is entitled to recover for a partial loss only, the defendants agreed to be defaulted, and that it be referred to assessors, to be appointed by the court, to ascertain the amount of such partial loss, on such principles as the court shall prescribe, and that judgment be rendered for the plaintiff, for the amount so ascertained with costs.

Jackson, for the plaintiff observed, that he considered this case as settled by the decision in *Lee* vs. *Boardman* (1), unless the circumstance of the decree of restoration having taken place before the abandonment varies the principle. But as this fact was unknown to the parties in this country, it cannot affect the decision of the case. The right of the assured to abandon, and the duty of the assurer to accept the abandonment, must depend on the state of facts at the period of the last intelligence from the ship. The abandonment is made with reference to that period. If it refers to the actual state of facts at the time of the offer, whence arises the necessity of a speedy election after the receipt of intelligence? If the obligation of the assurer depends on the state of the case as it actually exists in a distant country, although unknown to either party; then the obligations and the rights of the assured must depend upon the same facts; and it is then of no importance whether he abandons sooner or later after receipt of the intelligence, since his right depends on the facts at the moment of his offer, not on those existing at any former period. There certainly is a reciprocity

(1) *Ante Vol.* 3. 238.

in these rights and obligations. It is absurd to say that the assured is bound to make his election to-day, and that he is concluded by his offer to abandon; and yet that the underwriter may wait perhaps six-months (as would be the case in an *India* voyage) to decide by future intelligence whether he is bound to accept it. If the assurer may wait to ascertain whether the facts prove to be as supposed, and may decide by the event; the assured must have the same option. As he made the offer on this presumption, if it prove unfounded in fact, he ought not to be bound. If then neither party is bound, there is an end to the *vested* right, which the books say is the fruit of the abandonment.

Foreign jurists(2) concur that abandonment may be made for *defaut de nouvelles*, the time for which is regulated by the ordinances of *Louis* the 14th; and when so made is not defeated by the arrival of the vessel in safety, although that event disapproves the facts on the presumption of which it was made. The same principle governs in effecting the insurance originally. For an insurance made after the sailing of the ship is predicated upon the state of facts last known to the parties, and whether she was actually lost at the time of making the contract, or afterwards arrives in good safety, the parties are equally bound.

In the case of capture, one reason given by sergeant *Marshall*(3) for the right of abandonment is, that the owners lose the controul and power of disposition of the property, and it would be unreasonable to make them wait the event of the capture. The idea then is that after abandonment they have no further concern with the property insured; but must look to the sum due from the underwriters. Over this last they are presumed to have a controul; this they can dispose of; and they may calculate and rely upon it in their speculations, as they could on the property insured before the capture. In case of a capture in a remote country, the insured, upon advice of it, must speedily elect whether to abandon or not. But unless the doctrine contended for be true, the assurers, after the offer of abandonment is made, have a right to wait several months to ascertain how the

(2) *Valin. h. t. Art.* 60.—2 *Emerig.* 195, *c.* 17. § 6.—*Pothier. h. t.* 138
(3) *Page* 483, 484.

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facts stood on the day of the offer to abandon. For if the property being in fact at that time liberated discharges them, they must be entitled to a reasonable time to ascertain the fact. Then the offer, for all that time, precludes the assured from interfering with the property, lest he should predjudice the abandonment; and the assurer abstains, lest he should be considered as accepting it.

The assurer is only bound to pay at a certain limited time after notice and proof of loss; and the like proof must accompany the offer to abandon, or the assurer is not bound to accept it. By proof is not understood legal judicial evidence, but satisfactory proof of the fact in the sense of the expression as used among merchants. But an offer to abandon property in a foreign port cannot be accompanied with evidence of the facts as existing on the day the offer is made, and thus the assurer can never be bound to accept the abandonment.

But however the opinion of the court may be upon the foregoing question, it is contended for the plaintiff that the facts in this case shew an existing total loss of the voyage at the time the abandonment took place. The tea was then in *England*, where with the expences caused by the capture, and which by the decree of the admiralty were a lien upon it, it had lost more than half its value, and in this view there existed a constructive total loss. But the insurance was to *Bremen*; and the master had refused to take the tea on board and complete the voyage, which was thus totally defeated at that time.

The case, it is true, finds that it had been delivered to *Wilson*, who had volunteered his services, and claimed it on behalf of the plaintiff. But for this he had no previous authority, nor has the plaintiff ever confirmed his doings since. His unauthorized acts cannot therefore conclude the plaintiff, and they were, in effect, as much the acts of the defendants themselves as of the plaintiff, who has lost the whole benefit of his adventure, for which he now asks an indemnity from those whom he thinks bound by law to furnish it.

The solicitor general, of counsel for the defendants, observed that the facts in this case gave rise to a question which he believed had never yet received a decision, in the *English* courts, in the courts of this state, or in those of the United

States, excepting a case lately pending in the circuit court of the *United States* in *Pennsylvania* district, which he should presently take occasion to cite.

It is contended for the defendants in this case that the plaintiff cannot recover a total loss: because in the first place it appears by the facts agreed that the property insured was in safety, and actually restored to the plaintiff at the time he made the offer to abandon. Since the decision in the case of *Lee* vs. *Boardman*, it will not be contended but that a total loss once existed under this policy. But a very material distinction between that case and the one now before the court, and which the defendants rely upon, is that in *Lee* vs. *Boardman*, the property was in a state of actual arrest and detention at the time of the abandonment, whereas in the case at bar, the property was not merely decreed to be released, but was in fact delivered to, and in the full possession of the plaintiff's agent.

In *Pole* vs. *Fitzgerald*(4), it was unanimously decided in the exchequer chamber that, a ship being in safety at the time of abandonment, the assured could not recover. The right of abandonment in cases of capture is limited by *Marshall* (5), to the time "while the ship continues under detention." So "the assured can only abandon *while* it is a total loss"(6). Again, "There is no vested right to a total loss, till the in-"sured, having a right to abandon, elects to do so; for he is "only entitled to an indemnity for his loss as it stands at the "time of the action brought, or offer to abandon"(7). It appears then from these authorities, and more fully from the cases cited by *Marshall* in support of them that if *at the time of the offer to abandon*, the restraint has ceased, or the property is in safety, the right to abandon is gone also.

In *Lee* vs. *Boardman* the court say, "had he" [the plaintiff] "neglected to abandon, until after the restoration of the "ship to the master or supercargo, he would have waived

(4) *Willes' Rep.* 641. *Note.* The chief justice said that a better report of this case is in 5 *Brown's Parl. cases* 151.
(5) *Page* 483.
(6) *Ibid.* 484.
(7) *Ibid.* 485.—*Hamilton* vs. *Mendes*, 2 *Bur.* 1198.—*Dutilh* vs. *Gatliffe*, 4 *Dallas*, 446.

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"his right to consider the capture a total loss." And it appears that the decision of that case was principally bottomed on the fact, that the offer to abandon was made while the ship was actually detained by the captors. The court observe that lord *Mansfield* entirely and justly discountenanced the doctrine that a capture alone, without condemnation, and without abandonment *during its continuance*, was a total loss.

It is further contended that the restitution of the property having been made at the time of the offer to abandon, defeats the plaintiff's claim to a total loss, although that restitution was at the time unknown to him. This was expressly decided by the circuit court of the *United States* in a late case arising in the district of *Pennsylvania*. [Here *the solicitor general* read a note of the case of the *Rolla*, which was contained in a newspaper, in which judge *Washington* is reported to have determined, 1. That the state of the fact, not of the intelligence, at the time of abandonment must decide the question of total or average loss. 2. That capture and restitution before abandonment, though not known here, defeat the claim for a total loss. 3. That the property being safe, although not actually in the possession of the assured, the right to abandon and claim as for a total loss cannot be exercised at a subsequent period, with or without notice of the fact here. On this last point however judge *W.* only declared the leaning of his mind; as he thought the fact of actual restitution to the assured before the time of abandonment sufficiently established by the evidence in the case he was then deciding.]

The legal principle, that all decisions shall be governed by the actual state of the fact, is universal. The law of insurance precisely conforms to it; for the contract of insurance, and all questions arising under it, are to be construed and decided according to the rules of the common law.

In the following instances, the rights of the parties depend on the fact, and not on the intelligence.

1. Warranties both express and implied. When the breach proceeds from misinformation, or any other cause, whether innocent or fraudulent, the contract is void. *Seaworthiness*, although an implied warranty, must be taken according to the fact: if the breach in this case happen

through ignorance or misinformation of the assured, and even after he has taken every precaution to have his ship sea-worthy, the contract is nevertheless void.

2. Representations must be taken according to the fact, not according to the intelligence. If the representations be incorrect in a material point, though it be innocently made, and believed to be true by the party making it, yet it avoids the contract.

3. Interest in the property insured must be averred and proved. The assured may have information from a foreign country that his property is to be shipped; and upon that *intelligence* effects his insurance. It turns out that the property never was shipped. The *fact* in this case will govern the decision, and for want of interest the assured cannot recover.

4. A risk may have terminated, before the insurance is effected, by an arrival or loss; but if not known to the party, the insurance is good. In this instance *the exception proves the rule;* for it is in virtue of the words "lost or not lost" that this exception is provided for.

Why should falsehood or mistake be made the ground of a decision in a controversy concerning property? Suppose two vessels to be sailing in company, and to be met by an enemy at sea: one is taken; the other escapes and brings intelligence of the capture, upon which intelligence an abandonment is immediately made: suppose in a few hours after the separation of these vessels, the captured vessel is recovered, either by her own crew, by a ransom, or by a recapture and an agreed salvage immediately paid: she pursues her voyage and arrives in safety. Is it possible that upon such facts the assured would recover for a total loss? Yet he certainly may recover, if the intelligence at the time of abandonment, and not the fact, is to fix the rights of the parties.

Jackson, in reply, agreed that the main question, which had been argued, had not yet been decided in *Westminster Hall,* but he contended that the passages cited for the defendants from *Marshall,* were very far from supporting the doctrine urged by *the solicitor general.* Thus page 484. "If at the time the assured receives advice of the loss, or before he has elected to abandon, he receive advice that the

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ship or goods are recovered, or are in safety, he cannot then abandon:" plainly and necessarily implying that, if he has received advice of the loss and not of the recovery, he may abandon. And it is an absurdity to say that he had at one time a vested right to abandon, if at a future period it may become no right at all.

It cannot be denied that the opinion of judge *Washington* as reported in the case of the *Rolla* is in point against the plaintiff's claim. But a contrary decision has been made by the circuit court sitting in this district; and while it is conceded that judge *Washington* is among the first common lawyers in the *United States*, it will not be denied us that commercial law is at least as well understood in this part of the union, as in *Virginia*. That opinion was also subject to revision in the supreme court.

The reasoning of the court in *Lee* vs. *Boardman*, from the inconvenience of an uncertainty as to the rights and duties of the parties to an insurance applies with equal force to the present case. But if the defendant's argument is to prevail, abandonment instead of disentangling will cause more embarrassment than ever, and this to one party as well as the other. The property will be without an apparent owner. No one will take care of its preservation. The assurer and assured will equally stand aloof, lest by intermeddling the former may be deemed to have accepted the abandonment, or the latter to have waived it.

In the case before the court however the loss continued total at the time of the abandonment. The cargo was actually out of the plaintiff's custody or controul. After abandonment the custody and controul, whenever regained, accrued to the assurers.

The court took time for advisement, and their opinion was afterwards delivered by

PARSONS, C. J. [After stating the facts in the case.] Upon these facts the plaintiff claims to recover a total loss, because the loss was once total, and if it was by any subsequent events turned into a partial loss, he had no intelligence of those events, when he made the offer to abandon; and also because the total loss was not in fact reduced to a partial loss by any subsequent events before he made the offer.

The defendants admit a partial loss, but deny a total loss, because the total loss had in fact become a partial loss by subsequent events, before the offer to abandon, although the owner had received no intelligence of them.

By the capture, detention, and suit in the admiralty to obtain a condemnation of the teas, there was a constructive total loss of the plaintiff's property: and if the suit had been depending when he offered to abandon, it is admitted by the defendants that the plaintiff ought to recover a total loss. When he offered to abandon, he had intelligence of the capture, detention, and pendency of the suit; but while the intelligence of these facts was travelling to him, a restoration of his property was decreed to him, which he had in fact received, it is said, by his agent *Wilson;* but of this restitution and receipt he had no intelligence, when he offered to abandon.

These events, of which neither party had knowledge, it is said by the defendants, must operate upon the rights of the parties, and will defeat the election to abandon, which the facts known might have vested in the plaintiff. And the decision of the supreme national court in the case of *Marshall* vs. *The Delaware Insurance Company*, not yet reported, is cited in point.

Several objections of much weight have been urged against this position of the defendants, resulting from the nature of insurance, and the usage of merchants. It is said that in making the contract of insurance, the information of the parties, and not the facts, always govern: that if the risk on the property to be insured is in fact terminated, either by a safe arrival, or by an absolute total loss, at the time of the insurance; yet if the parties were not informed of those facts, the policy will be valid: that mercantile convenience requires that some rule should be settled, by which the parties may know when the owner may elect to abandon, because the right of election, when once existing, is a vested right; but if the owner cannot govern himself by his intelligence, but must be governed by facts, of which he cannot have knowledge, the parties cannot know in most cases whether he has a right to abandon at the time he makes the offer: that by law the owner must make his election within

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a reasonable time after he has intelligence of a constructive total loss, or he loses his right to abandon: his right must therefore depend upon the facts of which he has intelligence, and not upon facts which may afterwards exist, but of which he can have no knowledge, when he is obliged to make his election: that a contingent right to abandon is not recognized by the law merchant; for an owner calculating on the danger, to which his ship is exposed, cannot elect to abandon on the contingency that she is lost, which may prove to be the fact, and avail himself of his offer to abandon, when subsequent information shall prove that his right to abandon existed when the offer was made; but he must have intelligence of the loss before he is admitted to his election of abandoning.

There may arise great inconvenience from the defendants' position; for if the information of the parties is not to decide on the right to abandon, neither party, after the offer is made, will give any directions for the management or preservation of the property insured, as the offer to abandon will not be waived by the owner, nor admitted by the assurer, until future intelligence shall ascertain the state of the property when the offer to abandon was made.

It is also the usage of merchants to consider the right to abandon as depending on the facts known, and upon this principle premiums of insurance have been regulated.

There is no adjudged case directly in point in our books, but it is remarkable that there is no case to be found, where a total loss has been held changed to a partial loss, unless the owner had notice of the change before his offer to abandon. In an action against *The Massachusetts Fire and Marine Insurance Company* in the *United States'* circuit court, where the property insured was captured and detained at *Gibraltar* for some months, but liberated before the offer to abandon, although the liberation was unknown to the parties, one of the counsel for the defendants made the present objection to a total loss, because the parties are to be governed by the facts existing at the time when the offer to abandon is made, and not by the facts of which they have intelligence; but as the other counsel for the defendants admitted that it was the usage of merchants to be governed by the facts, of which intelligence had been received, the

question was not discussed at the bar, and the court in directing the jury, considered the law to be according to the usage.

But we do not think it necessary to decide this question, because we are not satisfied, from the facts in the case, that the constructive total loss, which it is admitted once existed, had ceased before the eighteenth day of July, when the offer to abandon was made.

It may be admitted as a general rule, that when a vessel is wrecked, so that she cannot carry her cargo to the port of delivery, but the cargo is safely delivered to the owner, who may ship it in a reasonable time on board other vessels to the port of delivery, he shall not abandon the cargo, but shall pay the original ship a *pro ratâ* freight(8).

In the present case the ship, by a sentence of the admiralty having jurisdiction of the cause by reason of the capture, was discharged of the teas, which were holden to pay the master his full freight; and when the teas were decreed to be restored to *Wilson*, he was obliged to give security for the freight. The captain refused to receive the teas on board, and the voyage insured was lost, and must be considered as continuing lost, until an opportunity offered to the owner of shipping them on board another ship for *Bremen*. If *Wilson* be considered as the owner's agent, and a delivery of the teas to him as a delivery to the plaintiff, the case states no opportunity of shipping them to *Bremen* in another ship, until the twenty-eighth of July following, when it was put on board a *Swedish* ship. This was not done until ten days after the offer to abandon was made, and thirty-six days after *Wilson* had received the teas.

The loss therefore continued constructively total, when the offer to abandon was made: for the safety of the cargo will not change the total loss of the voyage existing, until there be an opportunity in a reasonable time to re-ship the cargo, and the owner is not obliged to wait for other ships.

This opinion is formed on the admission that the principles in this case are the same which apply to a ship wrecked, and also that *Wilson* was the plaintiff's agent; both of which are questionable.

(8) *Marshall*, 505. *Manning* vs. *Newnham*.

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In this case the cargo was not only taken and detained as prize, but taken out of the vessel, and compelled to pay the full freight, and the master was discharged of his obligation to perform the voyage when the ship was able: and we can find no case, where under these circumstances the owner receiving his cargo in a foreign port is obliged to hire another ship to transmit his goods to the port of destination.

Neither does *Wilson* appear to be the plaintiff's agent, authorized by his act to bind the plaintiff's property. He had no previous authority from the plaintiff, who did not afterwards assent to his acts: and he must be considered merely as volunteering in the service, subject to the assent or dissent of the plaintiff upon notice.

Upon the whole view of the case, we are of opinion, that the total loss arising from the capture continued so to be total at the time the offer to abandon was made, and that the plaintiff recover a total loss.

WILLIAM NICHOLS *versus* MOSES THOMAS.

If an execution issue against an aggregate corporation, by the name of the president, directors and company, &c. with directionsto the officer for want of estate to take their bodies, the officer cannot arrest a member of the company by virtue of such execution.

TRESPASS for an assault and battery and false imprisonment. The action was pending in *Worcester*, and at the last September term in that county, a case was stated for the opinion of the court, by which it was agreed that one *Benjamin W. Willard*, in June, 1807, recovered a judgment at the court of common pleas for the said county of *Worcester*, against *the President, Directors and Company of the Union Turnpike Corporation*, who were incorporated by an act passed March 2, 1804, upon a promissory note which had been made to the said *Willard* by *Benjamin Kimball*, treasurer of the said corporation: that on the 9th day of said June, the said *Willard* sued out a writ of execution upon the said judgment, directed to the sheriff of the said county of *Worcester* or his deputy, commanding them to levy of the goods, chattels or lands of *the said President, Directors and Company* the amount of said judgment, and for want thereof, to take *the bodies of the said President, Directors and Company* and commit them to the gaol in

Worcester, until, &c.: that the said writ of execution was delivered to *Thomas*, the defendant, then a deputy sheriff of the same county, who by force thereof arrested the plaintiff, who was at that time "*one of the proprietors of the said Union Turnpike Corporation*," and held him in custody until he satisfied the said execution, by paying the amount of said judgment, with the officer's fees.

If upon these facts the court should be of opinion that the defendant had a right to arrest the plaintiff upon the said writ of execution and hold him in manner aforesaid, the plaintiff agreed to become nonsuit: otherwise the defendant agreed to be defaulted, and that judgment be rendered against him for, &c. damage, with costs of suit.

At the last September term in *Worcester*, *Bigelow* for the defendant cited 10. *Co.* 76. *b.*—9. *Co.* 68. *a. Cro. Eliz.* 188. 165. 467.

The cause was continued *nisi*, and now at this term the opinion of the court was delivered by

PARSONS. C. J. *The Union Turnpike Corporation* was incorporated by that name in March, 1804. *Willard*, a creditor of the corporation, recovered judgment against it, by the name of *The President Directors and Company of the Union Turnpike Corporation*, no notice being taken of the *misnomer*, although the corporation appeared to the plaintiff's writ. He sued out his execution on the judgment, which after reciting the judgment, contained the usual precept to the officer to levy the damages and costs on the goods, chattels or lands of the said president, directors and company, and also a precept, that for want thereof he should take the bodies of the said president, directors and company, and commit them in execution, until they paid the monies. The execution was delivered to the defendant, a deputy sheriff, to execute; who not finding any goods, chattels or lands of the corporation, on which to levy the money, arrested the body of the plaintiff, who was *one of the proprietors of the Union Turnpike Corporation*. I use the language of the parties in the case, presuming it to be meant that the plaintiff was one of the corporators, and consequently, by

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virtue of the act of incorporation, a proprietor of the turnpike made pursuant to that act. And the defendant, having arrested the plaintiff, held him in custody until he paid the monies due on the execution. To recover damages for this arrest and detention this action was brought.

The defendant would justify himself, because he was commanded to take the bodies of the said president, directors and company, and because the plaintiff was one of the company: and although this command was irregular and voidable, yet not being void, and coming from a court having jurisdiction in this case, he ought to be justified by his obedience to the precept.

Under the circumstances of this case, the defendant is entitled to every favourable construction of the proceedings and of his conduct, which can be legally admitted.

It is a general rule that when the authority, under which an officer acts, is voidable only, he is justified by it, but not when the authority is void.

In this case the corporation, as such, is sued. It has no body which can be arrested; and in the execution the words "the president, directors and company" are the name of an aggregate corporation, and are not the description of any individual persons, whose bodies are to be arrested. The precept is therefore absurd and impracticable. The defendant's error is owing to a mistake in the construction of his writ, and not to his obeying a voidable command. And he cannot be justified in his defence. If an execution should illegally issue against the body of an executor or administrator on a judgment against the estate of the deceased, the officer might be justified in arresting the body of the executor or administrator, as he did not mistake his precept, which issued from a court having jurisdiction.

But in this case, notwithstanding the precept, yet in fact the corporation, against which the execution issued, having no bodies liable to arrest, the officer could arrest none in obedience to his writ. It appears that he understood the name of the corporation expressed by the words "the president,

directors and company," as descriptive of natural persons, whose bodies he ought to arrest; which appears to be a pardonable mistake to which he was led by the improper manner, in which the execution was issued.

Nichols *vs* Thomas.

The defendant must be called.

Dana for the plaintiff.

SAMUEL S. WILLARD

versus

HENRY SHEAFE AND TRUSTEE.

A *contingent credit* is not subject to a foreign attachment.

BENJAMIN SMITH, who was summoned in this action September 8th 1807, as the trustee of the defendant *Sheafe*, disclosed on his examination the following facts, *viz.* that he sailed in the month of February 1807, in the schooner *Boston*, as master with a cargo of sundry articles belonging to *Zadoc French*, *Henry Sheafe* and himself, one third each, to *Martinique*, where he arrived sometime in March following; where he disposed of the cargo, with the exception of certain articles, which he specifies, and which he left in the hands of certain merchants in *Port Royal*, and took their receipts for the same as received by them of him to sell on his account and risk, the proceeds to be subject to this order: that he then returned to *Boston* with a cargo, the proceeds of that part of his outward cargo, which he had disposed of as aforesaid, and delivered the same to *Z. French* as ship's husband or agent, who sold it and accounted to him for his third part thereof; that he again sailed in the same schooner for *Martinique* in August, 1807, arrived there in September, and in October received payment in sugar for the articles he had left in the preceding voyage, as before stated: that on his return to *Boston* in December of the same year he delivered the said sugar to said *French*, who still acted as agent: that *Sheafe* never gave him directions to deliver the sugar to any per-

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son: that the same was sold by *French* for five hundred sixty four dollars and seventy-five cents: that he *Smith* also paid over to *French* a small balance in cash due from him to *Sheafe*.

The question upon these facts, *viz.* whether *Smith* was the trustee of *Sheafe* on the 8th of September, 1807, the date of the service of the process upon him, was briefly argued by *Channing* for the plaintiff, and *Gray* for the trustee, and the opinion of the court afterwards delivered to the following effect by

PARSONS, C. J. Smith as agent for the owners of the cargo of the schooner *Boston*, in which *Sheafe, French* and himself were equally interested, had left a part of the cargo in the hands of certain merchants in *Martinique*, to be sold on the joint account of the concerned. While these effects were in the hands of the merchants, *Smith* was not a debtor, or accountable to *Sheafe* for any part of the same, and consequently had no credits or effects of *Sheafe* in his hands. This was the state of that part of the cargo, when the writ was served on *Smith*; for he did not receive from those merchants any proceeds of the sales until October, 1807, which was a month after he had been sued as a trustee.

It has been several times determined that *a contingent credit* is not attachable by virtue of the statute of 1794. c. 65. The debt must be absolute, although the time of payment may be future. This construction in some measure accords with the custom of *London* respecting foreign attachments. For the foreign attachment of a credit is by a suit against the garnishee, the holder of it, commenced by the creditor in the name of his debtor. The debt attached must therefore be absolute, and even payable at the time of the foreign attachment. But the form of our process, as well as the provisions of the statute, admit of the attachment of a debt absolutely due, but payable *in futuro*.

Smith must be discharged as trustee.

DANIEL FARRINGTON *versus* OLIVER FARRINGTON.

In an action between other parties, the petitioning creditor is a competent witness to prove his own debt, upon which a commission of bankruptcy was awarded.

THIS was a real action tried at the last October term in *Norfolk* before *Parker, J.*

The demandant supported his declaration by shewing that upon a judgment recovered by him against the tenant in March, 1804, execution issued and was duly levied on the land demanded, and seizin and possession delivered to him, and the execution returned and recorded according to law.

The tenant claimed under *Ebenezer Trescott*, who was admitted as a party in the defence, and he purchased of *Moses Whitney*, assignee of *Farrington*, the demandant, who was duly declared a bankrupt on the 30th of July, 1803. The commission of bankruptcy and the proceedings under it were regular, and the sale by the assignee to *Trescott* was by publick auction, and without fraud or collusion.

The tenant, to prove the petitioning creditor's debt, on which the commission of bankruptcy was awarded, produced no other evidence than an attested copy of the proceedings under the commission, and the deposition of the petitioning creditor.

A verdict was directed to be given for the tenant, which was to be set aside, and a new trial granted, if the court should be of opinion that the doings of the commissioners were *primâ facie* evidence of the petitioning creditor's debt, or that the petitioning creditor was a competent witness to prove his debt: otherwise judgment was to be entered according to the verdict.

The action was continued *nisi*, and at this term *the chief justice* said that the opinion of the whole court was that the petitioning creditor was a competent witness, having no interest in the cause: and the verdict was set aside, and a new trial ordered.

THOMAS KIDD *versus* CHARLES SHEPHERD.

A debtor, against whom an action is pending for the recovery of the debt, cannot be held as the trustee of his creditor in a foreign attachment, in virtue of such debt after issue joined in such action and before verdict.

THIS was an action of *assumpsit* pending in the county of *Hampshire*. Upon *non assumpsit* pleaded and issue joined, the cause was tried at an adjournment of the last September term at *Northampton* before *Sedgwick, J.* and a verdict found for the plaintiff. The cause was continued *nisi* for judgment, upon a motion of the defendant, in which he stated that since the issue was joined, but before the verdict was rendered, the goods, effects and credits of *Kidd*, the plaintiff, had been attached in his hands as trustee of *Kidd*, in divers suits, which he severally sets forth in his motion, and declares that the amount of the several sums due upon those suits exceeds the amount for which judgment can be rendered against him in this action.

And now at this term the opinion of the court was delivered by

PARSONS, C. J. After a verdict in this cause for the plaintiff, the defendant moved, to stay judgment, because after the plea pleaded and issue joined, and during the term in which the cause was tried, before the verdict, the goods, effects and credits of the plaintiff were attached in his hands as trustee of the plaintiff in several suits commenced against him by his creditors.

We are all of opinion that the motion ought not to be granted. These attachments are made pursuant to the statute of 1794, c. 65. providing a remedy for creditors, whose debtors have entrusted and deposited their goods, effects and credits in the hands of others, so that they cannot be attached by the ordinary legal process. When a creditor has sued his debtor, and is endeavouring by compulsory process to recover from his hands his effects and credits, it is hardly to be conceived that it was the intention of the statute to consider those effects and credits as a trust and deposit, to be attached by a process by which the creditor is to be delayed or defeated in his action. But we do not decide on this point; because the statute provides that the goods, effects and credits, when thus attached, shall stand bound to satisfy the judgment of the attaching creditor; and

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when appropriated for that purpose, the trustee may defend himself at law against the principal: it is therefore manifest, that the effects must be attached under such circumstances, as will enable the trustee to plead the attachment in bar of the action of the principal, so that he may defend himself at law, and not to rely on a relief to be granted by the judge at his discretion.

In this case the attachment was made after plea pleaded and issue joined, and the motion is made after verdict. The trustee cannot therefore defend himself against a recovery by his principal, by the trial of any issue in fact or in law, on any plea which he has opportunity to plead. The attachment is therefore void, and judgment cannot be stayed. The principles of this decision were fully considered and settled in the case of *Howell* vs. *Frye*, trustee of *Freeman* in *Cumberland*(1).

Ashmun for the plaintiff.

Taylor for the defendant.

(1) *Ante Vol.* 3. *Page* 121.

WILLIAM PRATT, PLAINTIFF IN ERROR,

versus

AARON HALL, JUN.

A writ of error does not lie upon a process before a justice of the peace under the militia law.

THE plaintiff in error brought his writ to reverse a judgment rendered by *W. Wetmore*, Esq. a justice of the peace for this county, founded on a complaint of *Hall*, as clerk of a company of militia. The complaint alleged that *Pratt* was a soldier in the company, and liable to do military duty there-

If a writ of error has issued in a case where a *certiorari* ought to have been moved for; the court sometimes look into the proceedings, and if an error is found, on which a *certiorari* would have been granted, they will quash the proceedings; otherwise they will quash the writ of error, as having issued improvidently.

A master of a licensed vessel under twenty tons employed as a lighter in a harbour, and not going to sea, is not exempted from duty in the militia as a mariner in the sea service of a citizen of the United States.

The fine for non-appearance at a company muster of the militia is two dollars: at a battalion or regimental muster it is four dollars.

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in : that being so liable he was duly warned to attend a muster of the company on the 7th of October, 1806, and neglected so to attend, whereupon the complainant alleged that the said *Pratt* had forfeited four dollars, one half to the complainant, and the other to the captain for the use of the company.

The facts in evidence are recited by the justice, and from them it appeared that *Pratt* was liable to do duty in the company, unless he was exempted as being *a mariner actually employed in the sea service of a citizen or merchant of the United States.* In support of his claim to this exemption, he proved that he was master of a certain sloop called the *John*, of the burthen of eighteen tons, owned by himself and one *Benjamin Green*, and had been master thereof from the seventh day of July preceding: that on the day last mentioned he had paid hospital money as a mariner to the collector of the customs in *Boston* : that the said sloop was duly licensed to carry on the coasting trade : and was actually and generally employed in transporting bricks, stones, gravel and wood, from and to the islands and other places in the harbour of *Boston*, never going outside of the lighthouse.

The plaintiff demurred to the evidence before the justice, who overruled the demurrer, and adjudged that *Pratt* was not a mariner within the meaning of the statute, under which he claimed the exemption, and sentenced him to pay a fine of four dollars and costs.

B. Whitman for the plaintiff in error insisted, 1. That the evidence proved the plaintiff to be a mariner within the meaning of the statute : and 2. That the fine, to which he was liable, in case he was not by law exempted from military duty, was two dollars in this case, it being a company muster only, which he had neglected to attend. For both these causes, *Whitman* contended that the judgment should be reversed.

The opinion of the court was delivered by

PARSONS, C. J. The writ in this case was sued out to remove the record of a complaint and proceedings before justice *Wetmore* at the suit of the defendant in error, to recover of the plaintiff in error a fine for neglecting to appear

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at a muster of a company of the militia, to which it is said the plaintiff belonged.

It is very clear that in this case a writ of error does not lie; and the plaintiff in error, if aggrieved, ought to have sought relief by writ of *certiorari*. From an irregularity in the practice heretofore existing, the court sometimes, after the record has been sent up, have looked into it; and if any error was found, on which a *certiorari* would have been granted, they have quashed the proceedings; otherwise the writ of error has been quashed, as having issued improvidently.

Two exceptions to the proceedings have been taken by the plaintiff in error, *one*, that it appears from the evidence recited by the justice, that the plaintiff in error was, at the time when he was notified to appear, and when the company was mustered, a mariner actually employed in the sea service of a citizen within the *United States*. If this exception is supported by the evidence, it ought to prevail, agreeably to the act of congress, entitled, "an act more effectually to provide for "the national defence, by establishing an uniform militia "throughout the *United States*," passed May 8th 1792.

But by examining the evidence it appears that the plaintiff in error at those times was a lighterman plying within the harbour of *Boston*, transporting ballast and stones, from one part to another part of the harbour, in a vessel under twenty tons burthen. From these facts we are satisfied that the plaintiff in error was not a mariner actually employed in the sea service of a citizen of the *United States*, and that the conclusion drawn by the justice was legally correct.

A *second* exception is, that the justice imposed on the plaintiff in error a fine of *four* dollars, when by law he had subjected himself only to a fine of *two* dollars. When a soldier, on due notice, shall neglect to appear armed and equiped at a battalion or regimental muster, he will forfeit four dollars; but he will forfeit only two dollars for neglecting to appear armed and equipped at a company muster.

In the proceedings before us, it does not appear that the plaintiff in error had been notified, or had neglected to appear at a battalion or regimental muster. The justice has

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therefore mistaken the fine, and has exacted of the plaintiff in error a higher forfeiture than he had incurred.

As we should for this cause have granted a *certiorari*, let the proceedings be quashed.

C. Davis for the defendant in error.

WILLIAM TUDOR, PLAINTIFF IN ERROR,

versus

JOHN PECK.

A report of referees appointed pursuant to statute of 1786, c. 21. can be lawfully made respecting no matters not contained in the agreement of submission.

THE points arising in this cause will sufficiently appear from the opinion of the court as delivered by

PARSONS, C. J. The writ in this case was directed to the common pleas for the county of *Suffolk*, to send the record and proceedings of that court in the rendition of a judgment against the plaintiff in error, and in favour of the defendant in error. On examining the record it appears that the proceedings in that court were not founded on a writ, but on certain rules of reference made by the parties pursuant to the statute of 1786, c. 21. and the common pleas can have no jurisdiction, unless the referees derived and executed their authority pursuant to that statute.

By the statute, when a dispute is existing between any persons, the party making the demand may make a statement of it in writing under his hand, and lodge it with a justice of the peace in the county where he dwells, and upon the application of the parties agreeing on a reference, the justice may make an agreement of reference, to be annexed to the demand, which the parties must sign and acknowledge before the justice, and the referees may thereupon proceed to hear the parties upon the matters thus agreed to be submitted, and to make their report to the common pleas, who may render a judgment according to the report.

From the provisions of the act, the referees can take into consideration no matters, but what are contained in the agreement acknowledged before the justice. And because the

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common pleas are to have the same cognizance of reports under these agreements, which they have of reports made under the rules of that court, where distinct reports and judgments must be made and entered under the several rules ; it is very clear, that pursuant to this statute there must be a several report and judgment on each agreement of reference.

The construction of the statute being apparent, we have examined the record, to discover whether the proceedings have or have not pursued it. On the 8th day of July, 1806, *Tudor* makes and lodges his demand against *Peck* with a justice, on which an agreement of submission is regularly made, signed and acknowledged by the parties. On the same day *Peck* makes and lodges with a justice his demand against *Tudor*, on which another agreement of submission is made, signed and acknowledged by the parties. Afterwards on the 30th of August in the same year, the parties make a further agreement extending the authority of the referees to other matters than are contained in either of the acknowledged agreements of submission ; and this further agreement was not acknowledged before a justice. It appears from the report that the referees proceeded and reported upon matters contained in this further and unacknowledged agreement ; and upon this report the judgment in question was rendered.

This, in our opinion, is error, because the referees had no authority under the statute to consider and report on any matters not contained in some agreement of submission acknowledged by the parties before a justice. The referees have considered all the matters submitted to them, as well by the first agreement as the second, and the further unacknowledged agreement ; and they report on all these matters under the second agreement of submission only. Upon this report judgment having been rendered, we are also of opinion that in this there is error ; because a report under any agreement of submission must be upon the matters only contained in such agreement.

The judgment must therefore be reversed.

G. Blake and *Sullivan* for the plaintiff in error.

Amory and *Jackson* for the defendant in error.

THOMAS WIGHTMAN *versus* THOMAS HASTINGS, JUN.

The provision of the statute of 1803, c. 155. § 5. respecting costs, extends to actions brought up on demurrer, as well as those in which there has been a verdict in the court below.

THIS was an action of the case upon a promissory note. The plaintiff alleged his damage at 200 dollars. At the court below the defendant pleaded *non assumpsit*, to which the plaintiff demurred, reserving liberty to waive his demurrer and join the issue tendered upon the appeal. The defendant joined in demurrer agreeing to the reservation. Upon the appeal the plaintiff withdrew his demurrer and joined the issue tendered below. Upon trial of this issue before *Parker, J.* at the last November term, the jury returned a verdict for the plaintiff, and assessed his damages at 23 dollars 25 cents.

Upon this verdict *B. Whitman* claimed judgment for full costs for the plaintiff, notwithstanding the provisions of the statute of 1803, c. 155. § 5. which enacts that if in any action upon simple contract, which shall be brought to this court by the plaintiff's appealing, and in which the plaintiff shall demand, but shall not by the judgment of this court recover more than fifty dollars, the defendant shall recover his costs arising after the appeal. And *Whitman* suggested that the intention of the legislature was to prevent appeals from the common pleas in small causes after a trial, that trials might not be unnecessarily multiplied. These appeals from a judgment on demurrer stand on different ground, and amount to an agreement of the parties to give a jurisdiction to this court.

Ward, for the defendant, was stopped by the court.

Per curiam, (*absente Parsons, C. J.*) The words of the statute are too clear to leave a doubt. It is absurd to say that the parties may by their agreement evade a positive and very wholesome provision of a statute. The case is clearly within the provision, and to decide otherwise would be to make law, not to explain and administer it. The plaintiff is entitled to his costs before the appeal, and the defendant is entitled to his costs since the appeal.

THOMAS K. JONES *versus* STEPHEN FALES.

A promissory note is not entitled to grace, by the laws of this state, unless made payable with grace.

If payment of a promissory note made payable with grace is demanded of the maker before the last day of grace, the endorser is not holden.

A promissory note made payable in *foreign bills* is not a cash note, and therefore not negotiable.

ASSUMPSIT upon four several promissory notes, two of which were made by *Fales* payable to *William Clap* or order, and by him endorsed to the plaintiff, and the other two made by *Clap* payable to *Fales* or his order, and endorsed by *Fales* to the plaintiff.

Upon *non assumpsit* pleaded the cause was tried before *Parker, J.* at the last November term, and a verdict given for the plaintiff upon all the counts.

It appears from the report of the judge that with respect to the two first mentioned notes, upon which the defendant was the promiser, no question arose.

With respect to the two others, upon which *Fales* is sued as endorser, questions were made, as to the demand upon *Clap*, and the notice to the defendant as endorser.

One of these notes was payable in sixty days *and grace*, and the other in four months *and grace;* and the evidence was that the messengers of the *Branch Bank*, and of the *Boston Bank*, in which these notes had been left by the plaintiff for collection, on the first of the days of grace left a printed notification in the form used by those banks at the store or place of business of *Clap*, giving them to a young man who conducted *Clap's* business in his store, *Clap* himself being in town, and in the open course of business. But it appeared that the messengers did not carry the notes with them, but they remained on the files of the banks when the notifications were carried.

The notice to *Fales*, the endorser, was given on the last of the days of grace; and it was proved that this was the mode of demand adopted and used by the banks, and that *Fales* had been accustomed to do business at those banks, by leaving notes for collection, and by paying notes left for collection by others.

On one of the notes, which was in the following form, *viz.*

"680 dollars. *Boston*, 21, Oct. 1806.

Value receiv'd I promise to pay Mr. *Stephen Fales* or order in sixty days and grace six hundred and eighty dollars.

[Foreign Bills.] *Wm. Clap.*"

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A question was made as to its negotiability, on account of the words *foreign bills* being written as above.

The verdict was taken subject to the opinion of the court upon all these points; the defendant waiving his right of review, and agreeing that interest be calculated up to the time of judgment, and added to the sum found by the jury, if judgment should finally be entered upon the verdict: and the action stood continued to this term.

And now *Morton* for the defendant insisted that there had been no legal or regular demand on *Clap*, so as to make the endorser liable. A demand before the money was due was of no effect(1). The notes in this case were not made payable at either of the banks, so that the usage of the banks can have no operation here, if indeed they ought ever to be introduced to lead or controul the opinions of the court. The notes themselves ought to have been carried and presented, in order to constitute a legal demand(2).

Morton considered the note copied above as made payable originally in foreign bills, and if so, it was not a cash note, and therefore not negotiable, and then this action does not lie against the endorser. For this point he relied on the arrangement of the words of the note.

Jackson, for the plaintiff, observed that *English* opinions or authorities could have little or no bearing on the construction of this contract as arising out of the expression "and grace." In *England* there are now no days of grace properly so called. A bill or note made payable in 30, 60, or 90 days, is payable in fact in 33, 63, or 93 days. There is then no propriety in that country in making a demand until the enlarged time expires.

But in this country the words have a different import, and it is intended by them to shew that the money is actually due at the end of the days specified in the contract, but that the acceptor or maker will not be dishonoured, if he pays the money within three days after. As this point has not yet received here a judicial decision, the court will re-

(1) *Bayley on Bills*, 66, 67. *Wiffen* vs. *Roberts*, 1 *Esp. Rep.* 261.
(2) *Bayley*, 108. cites *Mercer* vs. *Southwell*. 2 *Show.* 180. *Rushton* vs. *Aspinall*, *Doug.* 654—680.

sort to merchants for evidence of the custom among them, not to enquire of them what the law is, but to enable the court to ascertain the meaning of the parties in making the contract, in order that they may apply the law to it.

This was the course taken at the trial of the action of *Noble* vs. *Kennoway* before lord *Mansfield* respecting a custom in the *Labrador* fishery, and afterwards approved and confirmed by the whole court(3). From that case it appears too that it is not material that the usage be of long standing. The case at bar expressly finds the usage, and brings the knowledge of it home to the defendant.

Upon the second point in the defence, *viz.* that it was not a cash note, as being payable in foreign bills, which must be understood to mean something different from current money, it does not lie in the mouth of the defendant, who has endorsed the note, to say it is not negotiable. If this were an action by an endorsee against the orignal promiser, the case might be different, but *Fales* is bound by his own construction of the contract.

If the opinion of the court should be that this was an original promise to pay in foreign bills, still it is apprehended that by this expression is to be understood a particular species, class or description of bank bills, all of which are money(4). If because the particular kind of money in which the note is to be paid, is specified, it therefore is not a cash note, then a note or bill of exchange for so many pounds sterling, or so many marks banco of *Hamburg* is not a cash note or bill, for these are not the money of the *United States*.

But the plaintiff contends that no such question arises on the note in this case. The promise is to pay 630 dollars. The words "foreign bills" are not in the body of the note, nor do they make any part of the original contract. They are inserted at the bottom of the note between brackets, and imply nothing more than an engagement on the part of the promisee, that he would accept payment of the note in that particular currency.

(3) *Doug.* 510. See also *Tassell & al.* vs. *Lewis.* 1 *Ld. Raym.* 743. *Brown* vs. *Harraden*, 4 *Term R.* 148.

(4) *Miller* vs. *Race*, 1 *Burr.* 457.

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The whole of this question arises merely out of the form of the declaration: and if the court should decide against the action in its present form, and send the cause to another trial, an amendment of the declaration will remove the ground of the objection.

Dexter for the defendant. One question in the case is whether payment of this note was demanded of the promiser in proper time, or in other words, when the note was payable according to the terms of it. For it will not be pretended that a demand of payment before it is due can have any operation upon the liability of the endorser. Now if it was the understanding of the parties, at the time of making the contract, that these words "and grace" meant three days in addition to the term otherwise limited, then such is the only legitimate interpretation of the contract. The words mean something, or they are mere surplusage: for this notion of a doubtful or suspended state of a contract, as the plaintiff's counsel has described it, is as novel as it is unfounded. If the words are to be rejected as surplusage, the demand was made too late: if they mean, as we contend them to mean, three additional days, it was made too soon.

That they have an appropriate and definite meaning, *viz.* three days, is perfectly known to merchants and to lawyers; and it is indecorous to suppose the court ignorant of what every one else knows. By applying this well known meaning to the expression used, the whole contract becomes intelligible, and every part of it has effect.

As to the custom of the banks, of which it appears there was evidence at the trial, we answer that these institutions are not to make laws but for their own conduct. Their chartered powers extend no farther. They are private corporations, each making its own rules of practice. But which of them are to govern? Are they the banks in *Boston?* In this case, the promise being to pay in foreign bills, it should seem that application should rather be made to the banks in the country. But of these each has its own rules, and perhaps each differing from the rest. The consequence of admitting their rules and customs, in determining the meaning of contracts, would then be that we should have a different law of contracts in different parts of the state.

But granting that there may be cases, in which evidence of this kind might be proper, cases in which the usage of the banks would controul the general law; still we insist that this is not such a case. The note here is a simple promise of A. to pay to B. or his order a sum of money. It is not made payable at any bank, nor is there any thing in the note, or in the case, to shew that either of the parties contemplated its ever being lodged in a bank. Is it then to be presumed that this note was payable at a bank? If such is to be the general presumption, it must be on the ground that the banks have vested in them exclusively the legal right to collect cash demands of and for every citizen. In this case it so happened that this note found its way into one of the banks in *Boston* for collection. But if such an event was not contemplated at the time of the contract, can the voluntary act of the holder of the note in placing it in a bank alter the rights of the parties, or the law to be applied to those rights?

It is said that the defendant has been accustomed to do business at the banks, but it is not found that he conformed in any instance to their rules. Nor, if it was so proved, would it bind him to such conformity in any other cases, where he should choose to resist.

Another objection which the defendant relies on respecting this demand is, that the note was not produced or carried by the messenger to *Clap* the promiser. Indeed it does not appear that the messenger was authorized to receive the money, if *Clap* had tendered it to him without demanding the note. The whole amount of what is set up as a legal demand in this case, is that the promiser was directed or requested to go to a place, to which he had never undertaken to go, and there pay the amount due upon his note: which is apprehended to be very distinct from, and far short of a regular demand of payment, by which a third person is to be affected.

It is further contended for the defendant that this note was not payable in money, and therefore was not negotiable. We admit that the *English* courts have holden the bills of the bank of *England* to be cash. In one case a tender in those bills, no exception being taken to them at the time, was held to be

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a good and valid tender. This is as far as those courts have gone. But the paper, known here by the name of foreign bills, stands on a very different footing. They are merely the promises of private corporations to pay certain sums at their several places of business, some of them at a greater distance, some at a less, but all far from the place where this contract was made, and where it was presumed to be executed. These foreign bills are like the notes of private bankers in *England*, good indeed so long as those who issue them remain in credit; but they have never been holden to be money. But these foreign bills are not current here as banker's notes are in *England*. It is true they are received in retail shops, where the advance on the goods sold probably balances the difference between those bills and cash: but they are not received by merchants but at a discount; nor are they received as cash on any terms at the banks or at the custom houses. They are not then money, nor the general standard by which the value of other commodities is estimated. They are themselves rather measured by that general standard, and are always received at a rate more or less depreciated. Unless the court can judicially know that some currency known by the name of foreign bills passes as cash, it is conceived they cannot decide the note in this case to have been negotiable.

But it is made a question whether these words are a part of the note. They were written at the same time with the rest of the note, and doubtless before it was signed. Their being inclosed with crotchets is too minute a circumstance to alter their effect. The preposition *in* must be understood as omitted, and when it is considered how frequently this part of speech is omitted in mercantile writings, it will be no forced construction to suppose the note intended to read "in foreign bills." This word is always omitted in bills of exchange. Thus "sixty days after sight" is used instead of "in sixty days after sight."

The gloss attempted to be given to these words by the plaintiff's counsel still leaves them as part of the original contract. If the money was paid punctually it should be received in foreign bills. It was then a contract to receive foreign bills at the time the note should arrive at maturity.

The court delivered their opinions seriatim as follows.

PARSONS, C. J. *Assumpsit* on four several promissory notes. Of two of the notes, *Fales* the defendant is the promiser; of the other two he is the endorser, *William Clap* being the promiser. The objections to the verdict arise on the counts upon these last notes. One of them was payable "in sixty days and grace," and the other "in four months and grace." They were both lodged for collection in a publick bank in *Boston*, where all the parties to these notes live. On the first day of grace the bank gave the promiser notice, that the notes would be due on the third day of grace, and requested him then to make payment; but did not present the notes. On the third day of grace, the notes not being paid, notice was given to the defendant, the endorser.

The objection is that there was no demand of payment of the promiser, when the notes were due.

A note of hand is not, by the laws of this state entitled to grace, unless it be expressly made payable *with grace*. And the endorser is not holden, without his consent, to pay the note, unless it has been presented to the promiser when due, and payment demanded; or due diligence used for that purpose. When a note is made payable with grace, the terms must have the same construction as are given them by the law merchant: and consequently the note is not due until the expiration of the time of grace, which is three days, unless the last day be not a day of business, and then it is two days. I must therefore infer that the endorser is not holden upon his endorsement of these notes without his assent, because the condition, arising from the construction of law, on which he engaged to pay, was not performed.

But as this condition is implied by law for the benefit of the endorser, like all other conditions it may be waived by him, for whose benefit it was made. And it is contended that in this case the defendant, when he endorsed these notes, agreed that if the notes should be lodged in any bank in *Boston* for collection and if the bank should, according to its usage, notify the promiser on the first day of grace, that the notes would be due on the last day of grace, and should request him to make payment, and should afterwards, on the

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last day of grace, notify the defendant, the endorser, that the notes were not then paid, that he would be answerable on his endorsement. Now if the defendant made this agreement, he must, both in law and equity, be holden to it.

The evidence is the usage of the banks in *Boston*, of notifying in this manner the promiser and endorser of any note, made payable with grace, and lodged for collection, and the payment by the parties on such notice: and that the defendant was conusant of this usage, and had in other cases conformed to it. This usage, I am satisfied, is evidence of the defendant's agreement proper to be submitted to the jury, to infer from it the agreement of the defendant. Evidence of this kind, and for this purpose, is not to establish new law, but to prove that the defendant has waived a condition implied by law for his benefit, and has consented to other terms, to which without question he might have expressly agreed. This objection to the verdict ought not in my opinion to prevail.

The last note is a promise to pay "six hundred and eighty dollars." These words nearly complete the line, at the end of which is a dash.—Below this line, at the left side of the page, and nearly on the same line with the promiser's name are written the words [*Foreign Bills*] included by brackets. The verdict, being general on all the counts, is objected to, because this last note is not a negotiable note, being made payable, not in cash, but in foreign bills.

It is not clear that we can, as judges, precisely determine the import of the words *foreign bills*: but I think we may do it with reasonable certainty. It is the common sense of the people, and must be our understanding, that when the word *bills* is used as a medium or subject of payment, the parties intend bank notes of some description. As judges we can take notice that several incorporated banks do their business in *Boston*, and that there are many incorporated banks, who do their business in other towns, some at a greater, and some at a less distance from *Boston*. This notice we have from the publick acts of incorporation. We must take notice, in common with the people, that bank notes derive their value, not only from the certainty, but the facility of payment: consequently that a man in trade in *Boston*, holding a bill issued

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by a bank at a distance from *Boston*, can less easily obtain payment, than he could, if the issuing bank was near to him: and that the different facility of procuring payment of different bills may create a difference in their value. I must therefore conclude that the import of the words "foreign bills" is not cash, but something differing in value from cash. The inference is, if these words are a part of the promise, and that by the promise the maker of the note did not bind himself to pay cash, but something, the value of which was to be estimated in cash, that the note objected to is not a cash note.

The next question is whether these words, thus written and placed, are a part of the promiser's contract. There is no evidence by whom the body of the note was written, or whether these questionable words were inserted before or after the signature, or by the promiser or promisee. I can therefore reason only from the face of the note. And it is a reasonable conclusion, that they must all be taken to be the words of the maker of the note, written before it was delivered to the promisee, and not the words of the promisee assuring to the promiser any honorary or legal indulgence either absolute or conditional. If they are the words of the promiser, they must be considered, either as idle words, or as a part of the promise, to which he gave his signature; or as a subsequent memorandum explanatory of the manner, in which the promise was to be performed. I am not authorized to consider them as words without meaning; and I do not think it material, whether they were part of the original contract, or added in explanation of it. For when the promisee took the note with these words on it, he was subject to the explanation in the memorandum, if it was one; as much as he would be bound by these words, if they were a part of the promise.

The words may secure a benefit to the promiser, and I consider him as stipulating that the money might be paid in foreign bills; and I consider the promisee, by taking the note thus written, as agreeing to the stipulation. And I can have no doubt, if on the day of payment the promiser had tendered to the promisee foreign bills in payment, and they had been refused, that this tender and refusal might have been well pleaded to a subsequent action upon the note.

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It is therefore my opinion that the note was not, in its original creation, a note for the absolute payment of cash, and so was not negotiable. This opinion resulting from the face of the note would have been different, if there had been any evidence that by these words the parties had a different design.

But is the verdict to be set aside for this cause? The action is by the endorsee against the endorser: and it has been in this state the immemorial usage for endorsees of notes not negotiable to declare against the endorsers as on a negotiable note. This usage may be in a few words explained.

The statute of 3 & 4 *Ann.* c. 9, was never enacted here, but in practice the provisions of the first section were early adopted, and the form of declaring on negotiable notes resulting from that statute, was extended to notes not negotiable. It may therefore be considered as the common law of the commonwealth, that all cash notes are negotiable; and that all notes for merchandize may be sued by the promisee against the promiser, and, when endorsed, by the endorsee against the endorser, who may declare in the same manner as he might, if the notes were negotiable.

Upon this principle the want of negotiability in the note comes to be no objection to the verdict. But it is insisted that this case is an exception to the general rule, because, although the note was admitted in evidence, yet the plaintiff having declared on it as a cash note, it did not support the count. As it is not a cash note, it did not support the count, and if the defendant had objected to it on that ground, the objection must have prevailed. But I am strongly inclined to the opinion, that objections to the evidence, as not comporting with the declaration, ought not generally to be admitted, unless the objections were made at the trial, and the point reserved. A contrary practice would introduce much mischief. Had such objection been made at the trial, according to the ancient usage of the court, in granting amendments at any time before the cause is committed to the jury, the plaintiff might have amended his declaration, and cured the defect; and thereby saved much time and expense to the parties.

But I think there ought to be exceptions to this rule which as a general rule is correct. If the objection goes to arrest

the judgment, it ought to be heard: because the defendant may move in arrest of judgment, after he has failed in a motion for a new trial. But this is not the present case. If the declaration unamended had varied the defendant's defence, either as to the principles of it, or as to the rule of damages, the objection might be made. But it appears to me that this case is not within this exception. For on producing the note to the jury, it was competent to the defendant to have given any thing in evidence to defeat the plaintiff's demand, or to ascertain the damages, which he could have given, if the declaration had been amended.

Another exception may be, when judgment according to the verdict will not be a bar to another action on the same contract, on the same breach of it. And I think the defendant's case is within this exception.

When judgment in one personal action is a bar to another personal action, the cause in both actions must be the same; which must appear from the record, or from the averment of the party pleading. But he cannot aver any thing repugnant to a record, to which he is a party. Now a contract to pay money, and a contract to pay money's worth in bills, appear to me to be essentially different, and cannot be averred to be the same contract. And if we were to render judgment on this verdict, it could not be pleaded in bar to an action brought by the plaintiff against the defendant, on the same note, declaring on it as a contract to pay money in foreign bills.

Upon the whole it is my opinion that the verdict ought to be set aside, and a new trial granted. The plaintiff may then amend, or, if his case will admit of it, explain by evidence, that by the words "foreign bills," the parties intended an effect consistent with the negotiability of the note.

SEDGWICK, J. declared his concurrence in opinion with *the chief justice.*

SEWALL, J. I concur in the opinion for granting a new trial, because the words "foreign bills," at the bottom of the note declared on, appear to be susceptible of an explanation, which may operate to vary the tenor and state of the contract: but unexplained, I think them words of no meaning applicable to the original contract. The defendant

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proposes to shew by mercantile usage, or by other evidence that these words are a part of the original contract; and the plaintiff insists, on the other hand, that they are to be understood as a collateral and distinct engagement, not applicable to the contract, as it now appears, in the hands of an endorsee.

I think there ought to be an opportunity for this explanation, which was in effect precluded at the trial. If the underwritten words make a part of the original contract, the writing given in evidence at the trial is not competent to support either of the counts in the plaintiff's declaration. But if not so explained, by evidence from usage or other circumstances brought home to the knowledge of the endorsee, I should think the verdict now excepted to correct upon the other circumstances of the case.

THATCHER, J. of the same opinion.

PARKER, J. I am not satisfied that there ought to be a new trial upon either of the points, upon which it is claimed; because substantial justice has been manifestly done by the verdict; and in my opinion sufficiently within the forms of law, to warrant a judgment thereon.

With respect to the objections arising from the supposed want of demand on the maker of the note, when it became due, and notice to the defendant as endorser, I shall say nothing; because we all agree that there shall not be a new trial on those grounds: and the *chief justice* has very clearly given the reasons of this opinion.

With respect to the last objection, *viz.* that the defendant is sued as endorser of a promissory negotiable note, and that the declaration is not supported by the note exhibited in evidence, because the words "foreign bills" are found on the paper on which the note is written; I find myself alone in the opinion that this objection ought not to prevail.

It seems to be admitted on all hands that the intention of the parties to the instrument, as originally made, is to be resorted to for an explanation, where its words contain any ambiguity: but that intention must be gathered from the nature and terms of the contract. Indeed in this case no evidence has been offered, to controul or explain the contract; but the legal effect of the instrument itself is what the parties by their exceptions aim to ascertain.

Now it is evident that *Clap*, the promiser, and *Fales*, the promisee, at the time of making this note, intended that it should be negotiable. This appears from its being made payable to *Fales or order*, and from the use of those terms, which are generally adopted in notes made for the purpose of transfer in the market, or of deposit in the banks for collection. There are words in this, sufficient to effectuate this intention, and to satisfy those to whom it might be transferred, that such was the true nature of the contract.

But the words "*foreign bills*" are written on it, and they must be allowed some signification. I apprehend a due signification may be allowed them, without impairing the validity of the contract, as intended by the parties when it was made. I consider those words as furnishing evidence of the understanding of the promiser and promisee, that if the sum secured by the note should be paid at the time stipulated, it should be received in bills of those banks, which have acquired the denomination of *foreign;* or in money at a discount, according to the market value of such bills on the day of payment.

Perhaps the endorsee, if he received the note before the day of payment, seeing those words on it, would be held to have taken it subject to the same agreement. But the original parties to the note seem to have been aware that a note, payable in any thing but money, was not negotiable. They therefore, lest the intention, which they manifest in the body of the instrument, should be frustrated by the insertion of the mode of payment agreed on between them, made the memorandum rather for the purpose, it should seem, of giving an honorary claim to the promiser to discharge his note, in a manner different from the express provisions of the contract, than with the intention of defeating the negotiability of a note, which possibly for the convenience of both had been made negotiable.

I am satisfied that the memorandum never was intended to check or interrupt the transferrable nature of the note; but that the verdict has given that effect to it, which its terms import, and which the parties originally designed. I am therefore opposed to granting a new trial.

New trial granted.

NICHOLAS VAN STAPHORST AND ANOTER
versus
DAVID PEARCE.

Upon an express promise to pay the factor of any one, for the use of the principal, the factor may maintain an action in his own name.

Where the debtor of A. has made an express promise to pay the debt to A's factor, the debtor cannot be held as the trustee of A. in a foreign attachment.

THE declaration in this action was in case upon sundry promises, and contained the following counts. 1. *Assumpsit* for money had and received. 2. On a bill of exchange as drawn by *Samuel Calder* on the defendant, and payable to bearer, with an averment that the plaintiffs are the bearers, of the acceptance of the defendant, &c. 3. On a bill of exchange as drawn by *Blandow and company* on the defendant payable to the plaintiffs, and accepted by the defendant. 4. On a bill of exchange as drawn by *Samuel Calder* on the defendant, payable to the plaintiffs, and accepted by the defendant.

At the last November term in this county the parties submitted the cause to the opinion of the court upon an agreed statement of facts, from which it appears that on the 19th of June, 1803, one *Samuel Calder*, who was master of the ship *Martha Washington* then at *St. Petersburg*, of which ship the defendant was owner, drew a set of bills of exchange on the defendant as follows, *viz.*

"Bill of Exchange for Ro : 25000.

St. Petersburgh, 19 *June*, 1803.

Six months after date you will pay for this my second bill of exchange the balance of the cargo I have received from Mess. *Blandow & Co.* for your account on board the *Martha Washington*, according to your letter addressed to me in date of March 16th of this year, the sum of twenty-five thousand rubles, payable at *Amsterdam* at Mess. *Van Staphorst & Co.*

Signed *Samuel Calder.*"

To Mr. *David Pearce, Gloucester.*

On the 23d of June, 1803, Mess. *Blandow & Co.* endorsed the said bills to the plaintiffs, who are the persons named therein, as follows,

"Pay to the order of Mess. *Van Staphorst & Co.* value in account. *St. Petersburg, June* 23, 1803.

Signed *Blandow & Co.*"

On the 8th of August, 1803, the plaintiffs, being holders of said bills so endorsed, sent one of the set to the defendant inclosed in a letter, in which they request his acceptance thereof; to which the defendant replied by letter of Nov. 28, 1803, saying, "The bills you hold in favour of Mess. *Blandow & Co.* for the *Martha Washington's* cargo, I am determined to discharge by a shipment to you as early as possible in the spring.—The above mentioned method of meeting these bills I hope will be agreeable."

March 16, 1803. The defendant wrote to *Calder* a letter in which he instructs him what articles he is to obtain for his homeward cargo, and adds "what money you may want, you can draw for, which will be duly *announced*."

January 6, 1804. The plaintiffs wrote the defendant, acknowledging the receipt of a sum of money from Mess. *Damen & Van Olivier* in part payment, and urge a provision to be made for the balance of the bills remaining due.

January 26, 1805. They acknowledge the receipt of a further sum, and add, "The balance on the same due to Mess. *Blandow & Co.* and interest since the time this object ought to have been paid, we are requested by Mess. *Blandow & Co.* to claim from you, as they want to have settled this account."

Mess. *Blandow & Co.* failed at *St. Petersburg*, and the defendant was summoned as their trustee in two several actions, in which they were defaulted, before the commencement of this action.

And if upon the facts stated the court should be of opinion that plaintiffs are entitled to recover in this action, the defendant agreed to be defaulted: otherwise the plaintiffs were to become nonsuit.

And now at this term the cause was argued by *Otis* and *Channing* for the plaintiffs, and *Prescott* and *Jackson* for the defendant.

Channing contended that this was a bill of exchange. Where the intention was to make a bill of exchange, that intention gives the character to the instrument. It is not even necessary, to constitnte a bill of exchange, that any payee be named, for in that case it shall be held payable to him of whom

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the value was received(1). The words "or order" are not necessary, nor is it essential to the character of this species of instrument, that it should be transferrable from one person to another(2).

This bill may then be considered in the first place as a bill payable to bearer or to *Blandow & Co.* and bearer. In support of this position may be cited the English cases of bills payable to fictitious payees(3).

If secondly this be considered as a bill drawn by *Blandow & Co.* in favour of the plaintiffs, there can be no doubt of the responsibility of the defendant, upon his acceptance(4). It is not necessary that the whole of a bill be on the same side of the paper on which it is written. If on the whole there was a valuable consideration paid, and an intention to create a bill of exchange, it will be construed as such, if possible. The paper in this case comes precisely within *Chitty's* definition of a bill of exchange. In *Heylin* vs. *Adamson* it is said by lord *Mansfield*, that every endorsement creates a new bill of exchange. And in the case of *Gibson & al.* vs. *Minot & al. in error*(5), lord *C. B. Eyre*, who differed from the other judges as to the plaintiffs' right to recover in that action agrees that if they had declared upon a bill drawn by the endorsers payable to the plaintiffs or their order, they might have recovered.

Channing went on to support this instrument as a bill drawn by *Calder* on *Pearce* payable to the plaintiffs, and as drawn by *Calder* on *Pearce* payable to *Blandow & Co.* or bearer, but as the court confined their opinion to the third count, it is considered as unnecessary to recite the arguments used.

As evidence of the defendant's acceptance, *Channing* relied on his previous orders to *Calder* to draw on him, on his subsequent letters to the plaintiffs, undertaking to take up the bill, and on the partial payments, which the case finds to have been made.

(1) *Chitty on bills*, 46. *Pothier*, 24.
(2) *Chitty*, 48. *Pothier*, 200. 206.
(3) *Vere* vs. *Lewis*, 3 *Term R.* 182. *Minet & al.* vs. *Gibson & al.* 3 *Term R.* 481. 1 *H. Black.* 569. *S. C.*—*Collis* vs. *Emett*, 1 *H. Black.* 313.
(4) *Kyd on Exchange*, 13. *Chitty*, 13. *Heylin* vs. *Adamson*, 2 *Burr.* 674.
(5) 1 *H. Black.* 609.

The words "value in account" used in the endorsement of this bill shew the property in the plaintiffs. But whether the holder of the bill paid a consideration or not, is immaterial, unless third persons are injured(6).

Jackson said the cause had appeared to him to lie in a very narrow compass. He contended that this paper was not in its original form a negotiable instrument. It was no more than a certificate from *Calder* the agent of the defendant, shewing the amount due from the latter to *Blandow & Co.* No bill is negotiable unless originally containing words empowering the proprietor to assign it. The cases respecting bills payable to fictitious payees and determining them payable to bearer arose out of the necessity of the thing. But no such necessity arises in this case. Nor will any equitable claims be infringed by a decision against the plaintiffs in this action, it being very plain from the facts that the real parties in interest are *Blandow & Co.* and that the plaintiffs are merely agents or servants of theirs.

Taking it for granted that this bill, as it is called, is not negotiable upon the face of it, can the plaintiffs recover upon the facts disclosed in this case? To answer this question, it is not necessary to recur to ancient principles respecting the assignment of *choses in action.* The most liberal decisions of modern times require evidence of an adequate consideration for the assignment(7). But nothing of that appears here. So to make an assignment valid, so far as to enable the assignee to maintain the action in his own name, there must be notice to the debtor and his assent. But there is nothing in the case, which shews notice to *Pearce* of a transfer of this debt, or an assent on his part to hold the present plaintiffs as his creditors. He considered himself the debtor of *Blandow & Co.* and the plaintiffs uniformly treat the business in that light in their letters to him. These letters were the only notice to the defendant, and they do not once suggest any interest in the plaintiffs. So that no assent of the defendant, or implied promise to pay them for their own use can be presumed.

(6) *Chitty*, 50. 51.—1. *Esp. Rep.* 261.—3. *Cranch*, 193.
(7) 1. *Mass. Rep.* 117.

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It is indeed immaterial to the defendant to whom he pays a balance which he does not dispute. Nor does he question the authority of the plaintiffs to receive this money, and to give him a good discharge as against *Blandow & Co.* their principals. The defence in this action is substantially made in behalf of those creditors of *Blandow & Co.* who have summoned the defendant as their trustee, and who must lose their debts, unless they can save them out of this fund.

Prescott enforced the observations made by *Jackson*, and urged particularly that this paper was not originally assignable, and if it was, that it had never been assigned. The cases cited for the plaintiffs were all of notes originally made negotiable, or from the necessity of the thing so construed by the court, as in the case of the fictitious payees.

Otis would have replied for the plaintiffs, but was stopped by the court, whose opinion was afterwards delivered as follows by

PARSONS, C. J. It appears from the case as stated, that on the 19th. of June, 1803, *Calder*, a master of the defendants's ship *Martha Washington*, was with the ship at *St. Petersburg*, and there purchased of *Blandow & Co.* a cargo for his owner, agreeably to whose orders to pay the balance due to *Blandow & Co.* he drew a bill for 25000 Rubles on the defendant payable in six months at *Amsterdam*, at the plaintiffs', without mentioning the name of any payee. This bill was delivered to *Blandow & Co.* who on the 23d of June sent the bill to the plaintiffs, with an endorsement directing the defendant to pay the contents to the order of the plaintiffs, value in account. The plaintiffs, at the request of *Blandow & Co.* sent the bill to the defendant, who accepted it; and it not having been paid, the plaintiffs have brought this action, in which they have declared in several different ways, that these facts might support some one of the counts.

The third count states the contract as a bill drawn by *Blandow & Co.* on *Pearce* in favour of the plaintiffs, and accepted. And we are all satisfied that the plaintiffs may recover on this count; because every endorsement of a bill may be considered as a new bill drawn by the endorser on the acceptor in favour of the payee.

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The defendant's counsel have not contested the truth of this position as generally true: but they argue that this case must be considered as an exception for two reasons.

1. Because from the letters of the plaintiffs it appears that they hold the bill on account of the endorsers, and therefore the action should have been sued in their names. This reason does not appear to have much force: for upon an express promise to pay to the factor of any one for the use of the principal, the factor may maintain an action in his own name; and as the endorsement expresses value in account, if the endorsee holds it for the use of the endorser, he is his factor, as to this bill. If *Pearce* had, after his acceptance, paid the bill to the principal, he might be allowed to avail himself of such payment against the factor.

2. The second reason is, that the creditors of *Blandow & Co.* have sued *Pearce* as their trustee, and therefore the money due on the bill is attached in his hands. This reason cannot prevail, for in this action we cannot consider the rights of any persons, who are not parties to the bill. And admitting that *Blandow & Co.* might have given notice to *Pearce*, not to pay the bill to their factors, the plaintiffs; yet the creditors of *Blandow & Co.* have no authority to discharge *Pearce* from his express promise made to the factors of their debtors.

Let the defendant be defaulted, and let the plaintiffs enter their judgment on the third count for the sum agreed to be due on the bill.

JOSIAH BEMIS *versus* JAMES FAXON.

A declaration in *assumpsit* laying the promise on a day before the teste of the writ is well enough after verdict; though it would be bad on a special demurrer.

THIS was an action of the case in *assumpsit*, commenced by a writ dated April 9, 1805, and pending in the county of *Norfolk*. The plaintiff declares upon a promise, made by the defendant on the first day of September, 1805, to carry a certain stone post for the plaintiff from *Bass's* corner to *Black's* wharf within a reasonable time, and that the de-

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fendant, although afterwards on the first day of March 1805 requested, never performed his promise, but so carelessly conducted himself in the premises, that by his negligence and default the said stone post had been broken and wholly destroyed.

Upon the general issue pleaded, a verdict had been found for the plaintiff; after which the defendant filed a motion in arrest of judgment, upon the ground that the promise is alleged to have been made before the *teste* of the writ.

This motion was argued at *Dedham*, September term, 1807, by *T. B. Adams* for the defendant, and *T. Williams* for the plaintiff.

In support of the motion *Adams* argued that the rule is, if the plaintiff will himself discover to the court any thing, whereby it may appear that he had no cause of action when he commenced his suit, his writ shall abate(1).

Thus where the *teste* of the original was before the day of payment in the condition of the bond, on which the action was brought, it was adjudged error, although after verdict(2).

So in *assumpsit*, where it appeared by the declaration that the action was brought before the cause of action accrued(3). And by lord *Mansfield*(4), No proof at the trial can make good a declaration, which contains no ground of action on the face of it. By *Buller, J.* (5), After verdict nothing is to be presumed, but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated.

Williams contended that though this declaration must have been acknowledged bad on demurrer, yet that the verdit had cured it. The statute of 1782. c. 11. § 6. requiring demurrers to declarations to be filed before the jury is impannelled will be evaded, if advantage can be taken of such defects after verdict. The verdict shews that the facts must have taken place before that time, and this action must therefore be a good bar to another action for the same cause. The declaration alleges the request to have been made before the date of the writ, which is inconsistent with the time alleged for the

(1) 5. *Gwil. Bac. Abr.* 332.
(2) *Cro. Eliz.* 325. *Moore*, 398.
(3) *Cro. Jac.* 574.
(4) *Doug.* 681.
(5) 1 *Term R.* 141.

promise: and the court will reject the first in order to support a verdict.

The cause stood continued *nisi*, and now the opinion of the court was delivered by

PARSONS, C. J. Had this objection been made on special demurrer, the declaration must have been quashed: but the plaintiff insists that the fault, which was a mere slip of the pen, is cured by the verdict.

If we take the whole declaration together, it seems impossible that the defendant could doubt as to the specific nature of the complaint against him, or that the jury could have been misled. It is true that the promise is alleged to be made at a day to come: but the breach is alleged to be committed afterwards on a day then past. We therefore feel a disposition to support this verdict, if it can be done without violating any correct principle.

It is not easy to reconcile all the cases on this subject; but the case of *Sorrel* vs. *Lewin* reported in 1. *Keb.* 354 is in point. In that case *indebitatus assumpsit* was brought, and the *assumpsit* laid on a day not then come. Infancy was pleaded in bar, to which the plaintiff replied that it was for necessaries, and on issue being joined, the verdict was for the plaintiff. Upon motion to arrest the judgment for this fault in the declaration, the court observed that there should have been a special demurrer, that it was well enough after verdict, which could not have been found for the plaintiff, but on evidence of a promise made before the action, and a duty before the promise. And the plaintiff had judgment. The principle of this case is very reasonable, and, as it is an authority in point, the plaintiff in the principal case must have judgment.

JOSEPH CLAP *versus* IRA DRAPER.

A grant to one, his heirs and assigns of all the trees & timber standing and growing in a close forever, with free liberty to cut and carry them away at pleasure, conveys an estate of inheritance in the trees and timber: and the grantee may maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees.

TRESPASS for breaking and entering the plaintiff's close in *Dorchester*, in the county of *Norfolk*, and cutting and carrying away five hundred trees of the value of five hundred dollars.

Upon not guilty pleaded the cause was tried at *Dedham*, and a special verdict found, from which it appears that on the 18th of May, 1763, *Joseph Humfrey* was seized of the close in fee, and by a deed then executed conveyed the same to one *Stephen Fowler* in fee: that on the same day *Fowler* reconveyed to *Humfrey* his heirs and assigns all the trees and timber standing and growing on said land forever, with free liberty for them to cut and carry away said trees and timber, at all times at their pleasure forever: that the plaintiff holds all the right which was conveyed by *Fowler* to *Humfrey*, and the defendant holds all the estate that was *Fowler's*: that in the deed executed by *Fowler* no consideration is expressed: that the defendant cut and carried away the trees mentioned in the declaration, some of which were standing at the date of the deeds aforesaid: that from the said date to the present time, the plaintiff, and all those under whom he claims, have taken and carried away the trees at their pleasure: and that during all that time the defendant, and all those under whom he claims, have had the herbage. And if upon the facts found, the court should be of opinion that the defendant is guilty of the trespass charged, or of any part of it, the jury find him guilty accordingly, and assess the damages: otherwise they find him not guilty.

The questions upon the plaintiff's right to recover upon this verdict was argued at the last September term at *Dedham* by *L. Richardson* for the plaintiff, and *J. Richardson* for the defendant.

L. Richardson to shew that the plaintiff had an estate of inheritance in the timber and trees growing on the land in virtue of the deeds produced at the trial, and that he was well entitled to this form of action, cited *Richard Lifford's* case 11 *Co.* 49. Sir *Francis Barrington's* case, 11 *Co.* 271.—*Ives's*

case, 5 *Co.* 11. 3 *Dyer's Rep.* 285,—2 *Brownl.* 289 322 328.—*Bracton*, 222.—*Co. Lit.* 4.—*Rolle's Rep.* 96. 99. 137.

J. Richardson contended 1. That the grant of the trees amounted only to a licence, and cited 3. *East's Rep.* 115. *Spyve* vs. *Topham*. 2. That the grant was confined to the trees then growing, and did not extend to such as should afterwards spring up. *Whistler* vs. *Paslow*, *Cro. Jac.* 487.—*Pincomb* vs. *Thomas*, *Cro. Jac.* 524.—3. That the plaintiff cannot have this action of trespass *quare clausum*, he not being owner of the close. The breaking the close being the principal or gist of this action of trespass, it lies only for the owner of the soil, and not for him who has a right to some accidental profits to be derived from it. If the plaintiff may maintain this action, it will follow that a stranger breaking this close will be subject to several actions to be brought by the present plaintiff and defendant respectively.

The cause was continued *nisi* for advisement, and now at this term the opinion of the court was delivered by

PARSONS, C. J. [After stating the action, and reciting the substance of the special verdict.] The two deeds in this case, executed on the same day, the latter referring to the former, and relating to the same transaction, must be considered as intended to effect the same contract, and must be construed together. The result of this joint construction is, that the grantor conveyed the close to the grantee in fee, reserving to himself an inheritance in the trees and timber, not only then growing, but which might thereafter be growing in the close. This is the natural effect of the grantee's agreement that the grantor and his heirs should have all the trees and timber standing and growing on the close *forever*, and not merely those then standing, or which should be standing within a limited time; and of a perpetual licence to cut and carry them away. The plaintiff having all the estate in the trees, timber and close, which the grantor had after the execution of these two deeds, he has an inheritance in the trees and timber, with an exclusive interest in the soil so far only as it may be necessary for the support and nourishment of the trees. 8 *Co.* 271.—*Cro. Jac.* 487.—2 *Roll. Abr.* 455. *l.* 20.—11 *Co.* 46.

Clap vs Draper.

For cutting down and carrying away the trees trespass undoubtedly lies. 2 *Leon.* 213. *Hitchcock* vs. *Harvey.*

But the defendant insisted that the plaintiff could not maintain trespass *for breaking the close.* Upon looking into the cases, we are satisfied that the plaintiff, having an inheritance in the trees, and an exclusive right in the soil of the close, as far as was necessary for their support and nourishment, may maintain trespass for breaking the close as well as for cutting. It appears to be a principal of law well settled, that where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of his particular use of the soil, he may maintain trespass *quare clausum fregit;* but not if his interest is in common with others. Thus this action lies for him who has the herbage, although not a right to the soil. *Moor.* 355. *Hoe* vs. *Taylor.*—*Co. Lit.* 4. *b.*—*Dalison.* 47. *Moor.* 302.—*Cro. Eliz.* 421. But if he is entitled to a portion of the herbage for a particular part of the year, he cannot maintain this action, but may maintain an action of trespass for spoiling his grass. 2 *Leon.* 213, *vid. also Yelv.* 187. *Dewclas & al.* vs. *Kendall & al.*

The latest case on this subject is the case of *Wilson* vs. *Mackreth,* 3 *Burr.* 1824. The plaintiff had an exclusive right to take the turf in a several parcel of ground, in which and in other parcels adjoining he and the other tenants of the manor had common of pasture, the right of the soil being in the lord of the manor. The defendand dug and carried away peats in the place in question, and it was held that the plaintiff might maintain trespass *quare clausum fregit* against him. And the difference there taken is between exclusive rights, and rights in common: that if the plaintiff had only a common of turbary, trespass would not lie.

Upon the authority of this case, as well as the reasonableness of the principle, the plaintiff, in consequence of his inheritance in the trees, had such an interest in, although not the right of soil, that he may maintain trespass *quare clausum fregit* in this case, and must have judgment on the special verdict.

WILLIAM MONTAGUE

versus

THE INHABITANTS OF THE FIRST PARISH IN DEDHAM.

THIS was an action of *indebitatus assumpsit* for money had and received, pending in the county of *Norfolk*. It came before the court upon an agreed statement of facts, and was submitted without argument. The cause being continued *nisi* for advisement, the opinion of the court, in which the material facts are stated, was delivered at this term by

PARSONS, C. J. This action is *assumpsit* for money had and received; and judgment is to be rendered according to the conclusions of law from the facts stated in a case agreed by the parties.

It appears that the defendants are a regular congregational society of christians; and that within the limits of the parish there is a regular episcopal society of christians, of which the plaintiff is the rector and incumbent; and that the action is brought to recover of the parish divers sums of money assessed for the support of publick worship in the congregational society on a number of the inhabitants of the parish, who the plaintiff says, are regular members of his society; that they have requested that their ministerial taxes may be paid to him; that he has demanded the same of the parish; and has delivered to the parish a certificate, signed by himself and a committee of the episcopal society, certifying that those persons are members of the plaintiff's church, agreeably to the form required by the fourth section of the statute of 1799. c. 87.

It is also admitted that fifteen of the persons mentioned in the cirtificate are regularly members of the episcopal church, and that the defendants are willing to pay their taxes to the plaintiff, when demanded in a reasonable time.

Whether these taxes can be demanded at any time, or if not, in what time they ought to be demanded, is one question between the parties.

Persons assessed for the support of publick worship in a parish, who have a right to have their monies paid over to a minister other than the parish minister, must notify the parish of their desire to have their monies so paid over, and the minister must demand the monies within a reasonable time after the assessment is made: and a year from making such assessment is a reasonable time; but in particular cases the time may be extended.

A person leaving the society in which the parish worship, and honestly and in good faith joining one of another religious denominatin, is entitled to have his money paid over to the teacher, on whose

instructions he attends, although he may have no conscientious scruples on the subject.

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On this point we are of opinion that the persons taxed to the support of publick worship in the parish must, within a reasonable time after they have notice of the assessment, notify to the parish their election to have their ministerial taxes paid over to their own minister; and if they do not, the parish have a right to pay them over to the parish minister. This right of election is founded on the third article of the declaration of rights, and is a privilege granted for the benefit of the party claiming it, and which he is not obliged to claim, but may waive.

As the publick teachers in the state are maintained by the annual payment of salaries, it must be presumed that a parish will not long retain parish taxes in their treasury, but will pay them thence for the uses for which they were assessed. And if a man, having this privilege, will wilfully or negligently omit to claim it in a reasonable time, the presumption is very strong that his intention is not to interrupt the parish in paying over his ministerial taxes for the use, for which they were assessed, and that he waives his privilege.

For the same reason his minister ought in a reasonable time to demand those taxes of the parish: for to demand them is a privilege, which he is not obliged to claim, but may waive.

The next question is, what is a reasonable time in such cases? As the parish minister receives an annual salary, it would be unreasonable to indulge any man, having this privilege, with so long a time to make his election, that the money, in the usual course of parish transactions, must have been paid out of the treasury, and the parish be obliged to make another assessment to refund it. But the parish may assess the ministerial taxes at any time within the year, even at the close of it, and there may be delays in giving notice of the assessment to the persons taxed. Combining these considerations, we think that the party, having the privilege in question, ought to give the parish notice of his election, and his minister ought to demand the money, within a year after the assessment is made. This time we mention as a general rule. There may be cases, in which it may be proper to enlarge the time, according to the circumstances which may attend them, as if there was an unreasonable delay in notifying the taxes assessed.

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There are three persons, whose taxes are demanded by the plaintiff, who are denied by the defendants to be members of the episcopal society, within the meaning of the third article of the declaration of rights; because it does not appear from the case that they cannot conscientiously worship with a congregational society. One of these persons joined the episcopal society from dissatisfaction at the settlement of the present congregational minister. No particular reason is assigned for the secession of another of them; but it is stated that they both have usually attended publick worship with the episcopal society, and have been officers therein. The third seceded because he could not obtain convenient accommodations for his family in the parish meeting house, but has, ever since his secession, attended the ministry of the plaintiff. Conscientious scruples are not assigned in the case for the separation of these three persons.

In fully considering the third article, we are satisfied that any man, leaving a congregational society, and honestly and in good faith uniting himself to a regular episcopal society, is entitled to the privilege in question: for he is then a member of a regular society of a denomination different from the parish society: and if he usually attends publick worship with the episcopal society, the minister of it is his minister. And the article provides that all monies paid by the subject, to the support of the publick worship, and of the publick teachers there mentioned, shall, if he require it, be uniformly applied to the support of the publick teacher of his own religious sect or denomination, if there be any on whose instructions he attends. And we should be unwilling to admit that so great is the distinction among the different denominations of religious societies in this state, that no conscientious man could honestly unite and worship with more than one of them, as his personal convenience, or the accommodation of his family should require. And with whichever he united and worshipped, that must be considered as his society, so long as this union should continue.

Judgment must therefore be rendered for the plaintiff, for a part of the taxes he has sued for. As none of these persons signified to the parish their election until April, 1807, in which

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month their taxes were demanded by the plaintiff, he can recover only the taxes assessed in the year 1806. The taxes of the prior years appearing to have been assessed more than a year before the election was notified to the parish.

Bidwell and *J. S. Williams* for the plaintiff.

Wheaton for the defendants.

KILBORN WHITMAN

versus

JOSEPH HUNT AND ADAM FISH HIS TRUSTEE.

The answer of a trustee in a foreign attachment must be received as true: and if he answer falsely to discharge himself, the plaintiff's only remedy is by a special action of the case under the 9th section of the statute of 1794, c. 65. providing this process.

THE only question before the court in this action, which was pending in the county of *Plymouth*, was whether *Fish* was to be adjudged the trustee of *Hunt*, the defendant, upon his answers to the interrogatories.

On his examination in the court below, he acknowledged having received personal property to a considerable amount, together with sundry parcels of real estate, which were conveyed to him by *Hunt*. But he did not shew explicitly in what manner he had discharged himself from his accountability. After the action was brought to this court by appeal, he underwent a further examination, upon which he stated the amount of the personal property, and the value of the real estate, as ascertained by a sale at auction, and also the amount which he had paid, or was answerable for an account of *Hunt*, who had absconded, and upon this statement there appeared a considerable balance due from *Hunt* to *Fish*.

The question was submitted without argument, and the action being continued *nisi* for advisement from the last October term at *Plymouth*, the opinion of the court was delivered at this term by

PARSONS, C. J. After the examination of the supposed trustee on oath, the plaintiff moves that he may be adjudged the trustee of *Hunt*.

It is evident that the trustee, on his examination in the common pleas, answered to some of the questions imperfectly, and

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to others evasively; and were we to give judgment on that examination, the trustee must be charged, because he has not discharged himself on oath. Since the cause has been removed here by appeal, the trustee has submitted to a further examination on oath, on which, if he is to be believed, he has unequivocally discharged himself.

There are certainly circumstances disclosed by him, which lead to a presumption of covin between him and *Hunt*, his principal: but in this process we are obliged to consider all the answers of the trustee as true: and his last answers, if true, remove that presumption.

He must therefore be discharged; and if he has answered falsely, the plaintiff may have his remedy on a special action of the case agreeably to the ninth section of the statute of 1794, c. 65, which gives this process.

Let *Fish*, the trustee, be discharged.

THE INHABITANTS OF BRIDGEWATER
versus
THE INHABITANTS OF DARTMOUTH.

In what cases a town is estoppedfrom denying the settlement of a pauper.

IN this action, which was *assumpsit* for sundry expenses incurred by the plaintiffs in providing for and burying sundry paupers alleged to have had their legal settlement in *Dartmouth*, the jury found a verdict for the plaintiffs by consent of the parties, subject to the opinion of the court upon a case stated. The facts, as well as the points made in the cause, will sufficiently appear in the opinion of the court now delivered (the action having been continued *nisi* from the last October term at *Plymouth*) by

PARSONS, C. J. The action is *assumpsit*, in which the plaintiffs demand of the defendants the sum of 242 dollars 27 cents for the maintenance of *Jane Wing*, and her three children, *John*, *Cassandra* and *Priscilla*, and for the funeral expenses of *John*, between the months of July, 1804,

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and November, 1805: and also a further sum of 20 dollars for the maintenance and funeral expenses of *Hannah Slocum*, alleging that they were all paupers, whose settlements were in *Dartmouth*.

Upon the general issue pleaded, a verdict was found for the plaintiffs, for the two sums, by the consent of parties, subject to the opinion of the court on certain facts agreed by them.

In looking into the case, there is no evidence that the settlement of any of the paupers was in *Dartmouth*: the plaintiffs claim a verdict on the ground that the defendants are estopped to deny the settlement to be in their town.

It appears that neither of these towns choose overseers of the poor, but the selectmen act in that character: that in June, 1802, *Jane Wing* and her three children having been maintained by *Bridgewater*, the selectmen of that town gave notice to the selectmen of *Dartmouth*, with a bill of the expenses, agreeably to the twelfth section of the statute of 1793. c. 59. and requested them to remove the paupers. The selectmen of *Dartmouth* did not return any answer to this notice, but paid the bill; and the paupers were not removed from *Bridgewater*. On the 27th of August, 1804, after a portion of the expenses demanded in this action had been incurred by the plaintiffs, the selectmen of *Bridgewater* again notified the selectmen of *Dartmouth*, that two of *Jane Wing's* children were chargeable for their support, and requested the selectmen of *Dartmouth* to remove them. To this notice an answer was returned on the 20th of October following, purporting to be from the selectmen of *Dartmouth*, but signed by one of them only, denying the settlement of *Jane Wing* or her children to be in *Dartmouth*.

The plaintiffs have urged that as the selectmen of *Dartmouth* did not object to the first notice, but paid the bill of expenses, the defendants are estopped as to *Bridgewater* to deny the settlement to be in *Dartmouth*, and especially as the objection to the second notice is signed only by one of the selectmen.

It is well settled that estoppels, by which a party is prevented from defending himself by telling the truth, are to be

confined within strict rules. And we are of opinion that the statute of 1793, c. 59. provides estoppels but in three cases.

One case is where notice has been given pursuant to the 12th section of that statute, and (no objection being made within two months) the town giving the notice have actually removed the paupers to the town, to which notice was regularly given. This is not the present case; for *Bridgewater* did not in fact remove the paupers to *Dartmouth*.

Another case of estoppel is, when a town has recovered judgment against another town for the maintenance or removal of a pauper alleged to belong to the last town; such judgment is conclusive between the parties, as to all future charges of maintenance. Neither is this the present case; for *Dartmouth* paid the bill without a suit.

The plaintiffs failing on these grounds have further insisted that no objection was made in two months by the selectmen of *Dartmouth* to the second notice, which is the foundation of this action. If this appear from the facts agreed, this is the third case, in which the defendants are estopped to contest a settlement. The objection is drawn up, as the language of all the selectmen, in the plural number, and against the name of the subscriber is written "selectmen of *Dartmouth*." This we consider as a subscription in behalf of the selectmen. The statute requires the objection to be in writing; but does not require it to be signed by the greater number of the selectmen: and the defendants in this action consider the written objection as the act of their selectmen. We are therefore of opinion that the defendants are not estopped from disputing the settlement on the ground that their selectmen did not object within two months. Indeed the second notice is very imperfect. It has no relation to *Jane*; but is confined wholly to two of her children, without naming them.

The defendants not being estopped, the plaintiffs cannot recover any thing for the maintenance of *Jane Wing* and her children, or for the funeral expenses of her son *John*.

The demand of 20 dollars for the maintenance and funeral expenses of *Hannah Slocum* stands on a different foundation. The selectmen of *Bridgewater* gave regular notice to the selectmen of *Dartmouth*, and requested her removal. To

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this no answer was returned, and the defendants are in this action estopped to deny that her settlement was in *Dartmouth*.

The verdict must be amended by reducing the sum therein found to 20 dollars, and upon the verdict thus amended judgment must be rendered for the plaintiffs.

Baylies for the plaintiffs.

Sproat for the defendants.

EZRA PENNIMAN
versus
JOHN VINTON AND AL. ADMINISTRATORS OF JOHN VINTON, DECEASED.

In an action of *assumpsit* by a surety in a bond, who had paid a part of the debt, against the principal, the statute of limitations is a good plea.

IN this action which was continued *nisi* from the last September term in *Norfolk*, the following opinion of the court was delivered at this term by.

PARSONS, C. J. This action is *assumpsit* by the plaintiff against the administrators, declaring that the plaintiff being surety for their intestate in a bond, the deceased promised to indemnify and save him harmless: and that the plaintiff, as surety, had been obliged to pay a part of the bond, and the deceased, the principal, had not indemnified him. There are also two other counts for the same cause of action.

The defendants pleaded several pleas, *viz. non assumpsit* generally, on which issue was joined: *non assumpsit infra sex annos:* and that the cause of action did not accrue within six years. These pleas were traversed, and on the traverse issues were joined. On these issues the jury found that the deceased did not make the promises alleged in the second and third counts; but they found that he made the promise alleged in the first count, for the breach of which they assessed damages. But they further found that neither did the cause of the action accrue, nor was the promise made within six years.

This verdict, as to the last issues, was found by consent of the parties, subject to the opinion of the court upon the following facts: that the bond mentioned in the declaration

was executed on the fifth day of June, 1789, by the deceased as principal, and by the plaintiff as his surety: that the bond was discharged in September, 1791, the surety paying 225 dollars towards the discharge: that the principal died in November, 1803: and that the action was commenced in August, 1806.

On these facts it is evident that the jury were warranted in the conclusions which they drew in this verdict. But it was the intention of the parties, in making the case, to submit to the court a question, which does not appear to arise out of the case, *viz.* whether the statute of limitations is or is not a good plea in this action.

This question however arises from the record. For if that statute is not pleadable in this action, the issues joined upon the two pleas of the statute are immaterial; and a verdict being found for the plaintiff on the general issue, he is entitled to judgment. The plaintiff denies the validity of the special pleas on the authority of the case of *Cole, ex'r. vs. Saxby*(1). This was a *nisi prius* case before lord *Kenyon*, who expressed his doubts whether the statute of limitations can be pleaded to an action similar to the one now before the court. We have considered the point, and are all satisfied that such a plea is good.

The action is *assumpsit*, and is within the words of the statute, and we think within the intent of it. Payment by a surety in behalf of his principal may be matter *in pais* without suit; and the evidence of it may be lost by the death of witnesses, the loss of vouchers or other accident. And we cannot distinguish this case in principle from a case, where the action may be brought by a surety in a promissory note against the principal, for not indemnifying him against the payment of the note. In such a case it is not denied that the statute of limitations would be a good plea, because, as it is said, the action is not founded on a bond. In the present case the action is not founded on a bond, but on a promise or simple contract (although the executing of the bond as a surety is the consideration of the promise); and the breach

(1) 3 *Esp. Rep.* 159.

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of the promise is the not indemnifying the plaintiff against the payment of the bond, and is not the nonperformance of any contract, to which the principal was bound by deed to the surety.

Upon the whole record the defendants are entitled to judgment.

Thayer and *Richardson* for the plaintiff.

T. Williams for the defendants.

THE INHABITANTS OF BREWSTER, PLAINTIFFS IN ERROR,

versus

THE INHABITANTS OF HARWICH.

When an act, incorporating apart of a town, and erecting it into a new town, provides that all the debts due to or from the original town shall be divided between the towns in proportion to the state valuation; and that the poor, with which the original town was then chargeable, together with those then removed therefrom, and afterwards returning for support, shall be devided in the same proportion; the legal construction of such a provision is that the debts are to be paid to or by the original town, who may be compelled by the new town to pay over to it its proportion of debts received, and may compel such new town to reimburse its proportion of debts paid; and that the charges of maintaining the poor, and not their persons, are to be divided, each town having a remedy against the other for the reimbursement of any excess of such charges beyond its due proportion.

Such a provision does not affect the settlement of any of the inhabitants of either of the towns.

THIS was a writ of *error* brought in the county of *Barnstable*, to reverse a judgment of the court of common pleas for that county, by which the settlement of the wife and two children of *Stephen Snow*, a pauper, was adjudged to be in *Brewster*.

The cause was briefly spoken to at the last October term at *Barnstable*, by *B. Whitman* for the plaintiffs in error, and the *Attorney General Bidwell*, and *Bangs* for the defendants in error, and continued *nisi* for advisement. The opinion of the court, which shews all the material facts in the cause, was delivered at this term by

PARSONS, C. J. It appears from the record sent from the common pleas that the plaintiffs in error were original defendants in a pauper cause, in which they were prosecuted by the defendants in error, to obtain a removal from *Har-*

wich to *Brewster* of *Mehitabel*, the wife of *Stephen Snow*, and of *Abigail* and *Clarissa* his two daughters, and to recover the damages occasioned to *Harwich* by their maintenance. The record contains the judgment for the defendants in error, and the reasons of the judgment, but not the facts on which the judgment was founded. To prevent the delay of sending the cause back to have the facts stated, they have been agreed by the counsel for the parties.

The substantial parts of the facts are, that the northerly part of *Harwich* was incorporated, and made a town by the name of *Brewster* by the statute of 1802, c. 76: that after the incorporation an agreement was made by the overseers of the respective towns, to divide and settle half the then poor of *Harwich*, to be supported by *Brewster*, in which agreement the same *Stephen Snow*, with others, are stated to be delivered by *Harwich*, and to be received by *Brewster*, to be supported, and two other paupers were to be supported at the equal and joint expense of the two towns: that at the time of incorporation, and long before, *Stephen Snow* was a pauper, having his settlement in *Harwich*, and living in that part not included in *Brewster:* and that his daughters are young children living with him as part of his family, but that neither his wife nor daughters had, at or before the incorporation been personally a charge upon *Harwich* for their maintenance.

The general error is assigned: and if the settlement of the wife and children of *Stephen Snow* is in *Brewster*, the judgment must be affirmed; otherwise it must be reversed.

Both parties have very properly admitted that the wife and daughters have no settlement in their own right, and that it is derived from *Stephen Snow*, the husband and father.

Stephen having his settlement in *Harwich*, there it must continue, unless he gained a settlement in *Brewster*, either by the act incorporating it, or by the agreement of the overseers made in consequence of that act. The part of the act relating to this subject is the fifth section, which provides that all debts due to or from *Harwich* shall be divided between *Harwich* and *Brewster* in proportion to the state valuation; and that the poor, with which the former town was

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then chargeable, together with such poor then removed from *Harwich*, and which might afterwards be lawfully returned to that town for support, shall be divided between the two towns in the same proportion.

The operation of an act incorporating a part of *Harwich* into *Brewster*, where no regulations respecting the poor are included, does not admit of dispute. All the inhabitants of the territory now in *Brewster*, who were settled in *Harwich* have acquired a new settlement in *Brewster;* and all persons settled in *Harwich*, but inhabitants of other places at the incorporation, remain settled in *Harwich*, if when they last dwelt in that town they lived on lands remaining to *Harwich:* but if they lived on lands included in *Brewster*, they gained a new settlement in *Brewster*. These distinctions are founded on the statute of 1793, c. 34. Before this act all persons settled in *Harwich* at the time of the incorporation of *Brewster*, but then dwelling elsewhere, would have retained their settlement, although they might have removed from that part of the town included in *Brewster*.

The intent of the fifth section of the act incorporating *Brewster* is therefore to be determined. And we are of opinion that it can have no effect to change the settlement of any of the inhabitants of either of the towns. Those living in *Brewster* have a new settlement in that town, and those living in *Harwich* have their old settlement. It is the manifest intent of the section to provide for the apportionment of the charges of maintaining the then poor of both the towns, and of such as should afterwards be returned: that these charges should form a common stock, to be borne by the two towns according to their taxable wealth, to be ascertained by the state valuation.

It is our duty to give such a construction of this section, as would enable either town to execute it against the assent of the other. But how could the settlements of the poor be accommodated to any *pro ratâ* division of the charges of maintenance? Neither town could institute a process against the other, to obtain a removal of paupers, but of those actually settled in the town, against which the process should issue. The number of paupers might be uneven, and a di-

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vision of them would leave a pauper undivided, or half a pauper to each town; and who are authorized to make a division? the charges of maintaining one pauper may be much greater than the charges of maintaining any other pauper: and if a power was given to any persons or court to divide them according to the charges of maintenance, in the proportion directed by that section, it is not very probable that any such division would correspond with a division of the paupers without leaving a fraction. We therefore feel ourselves obliged to apply this section to a division of *the charges of maintenance*, and not of the *persons of the poor*. On this construction each town may advance the charges of maintaining the poor having a settlement within it, and by legal process may compel the other town to reimburse its due proportion.

The section appears to have been draughted very loosely; and this construction is supported by that part of it relating to debts. The debts due to or from *Harwich* are to be divided in the same proportion. But it is evident that this division could not change the relation between creditor and debtor. The town of *Harwich* may therefore compel by law the payment of all the debts due, and when received must pay over to *Brewster* its proportion. So *Harwich* may be compelled to pay all the debts owing, and may call on *Brewster* to reimburse its proportion.

If this section has no operation upon the settlement of the poor, it is evident that the agreement between the towns could have no such operation; because the towns have no legal authority to alter the settlements of any of the inhabitants.

We desire to be understood as giving no opinion that these towns could not lawfully agree, each to maintain a particular part of the poor, instead of apportioning the charges among themselves. An agreement of this kind may be convenient and beneficial to both towns, and may be enforced by an action at law to recover damages for the breach of it.

As we are of opinion that *Stephen Snow's* settlement remains in *Harwich*, notwithstanding the agreement of the overseers, it is unnecessary to decide whether his wife and daughters were or were not a charge as paupers on *Har-*

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wich at the time of the incorporation; because the husband and father was then a town charge. If it were necessary to decide this question, the kind and degree of relief, which he received, should have been stated.

Let the judgment be reversed with costs.

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A writ of possession was not necessary to complete a judgment in favour of the state in prosecutions under the laws against absentees.

If a judgment of a confiscation under the absentee laws was rendered after the treaty had declared that no future confiscations should take place, such judgment is valid, unless reversed by writ of error.

The laws made against conspirators and absentees before the adoption of the constitution of the commonwealth, are not repealed by the declaration of rights prefixed to the constitution.

THIS was a *writ of right* to recover seizin of one undivided fifth part of a messuage and land therein described, alleging that the demandant's father *Archibald M'Neil* was seized thereof within sixty years past, and that the tenants had no entry, except by *Samel Conant*, who disseized the said *Archibald*.

The tenants claim under *Richard Chamberlain*, who vouched in *Joshua Woods*, who vouched in the heirs, executors and administrators of *Samuel Conant* deceased, who have vouched in the *Commonwealth*, who, by the *attorney* and *solicitor general*, pursuant to a resolution of the legislature, pleaded that the tenants have more right to hold the tenements damanded than the demandant has to recover them; upon which plea issue was joined. At November term, 1806, this issue was tried before *Parker, J.* and a verdict found for the tenants; which verdict was understood to be given subject to the opinion of the court on certain points of law reserved by the judge, as stated in his report of the case, upon which the demandant moved for a new trial.

The parties, being desirous to obtain a judgment on principles of law finally to settle the controversy, at this term agreed upon the following statement of facts and evidence.

I. It is agreed that *Archibald M'Neil*, on whose seizin the demandant counts, was before and on the nineteenth day of April, 1775, an inhabitant and member of the late province, since state, of *Massachusetts Bay*, and a resident in the town

of *Boston*, within said province and state: that he was a subject to the king of *Great-Britain*, and never withdrew his allegiance from the said king, but adhering to him lived his subject until his death, which was in July, 1784.

II. That before the said nineteenth day of April, 1775, *viz.* in 1753, the said *Archibald M'Neil* became seized of the demanded premises in fee simple, and so continued until March, 1776, when he left the said state of *Massachusetts Bay*, and never in his lifetime made any deed, grant or conveyance of the same.

III. That after the nineteenth day of April aforesaid, *viz.* in March, 1776, the said *Archibald M'Neil*, without the permission of the legislature or executive authority of the said state of *Massachusetts Bay*, or of any other of the *United States*, withdrew himself from the said town of *Boston*, and said state of *Massachusetts Bay*, with the fleet and army of the said king of *Great-Britain*, into parts and places under the acknowledged authority and dominion of the said king; and adhered to the said king, his fleet and army, and never returned into the said state of *Massachusetts Bay*, or any other of the *United States*, until after the treaty of peace between the said *United States*, and the said king of *Great-Britain*.

IV. That the said *Archibald M'Neil* was the same person mentioned by the name of *Archibald M'Neil* in an act passed in the year 1778, entitled "an act to prevent the re-"turn to this state of certain persons therein named, and "others, who have left this state, or either of the *United* "*States*, and joined the enemies thereof."

V. That by virtue of an act entitled, "an act to prevent "the waste, destruction and embezzlement of the goods or "estates of such persons, who have left the same, and fled "to our enemies for protection, and also for payment of "their just debts out of their estates," passed in 1777, *Andrew Black*, was in the manner prescribed by said act, appointed by the judge of probate for the county of *Suffolk*, an agent for the estate of the said *Archibald M'Neil*, as an absentee: and, conformably to the provision of said act, immediately afterwards entered into, and took possession of, the demanded premises, as estate left by the said *Archibald*

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M'Neil, and being so in possession thereof, in his said capacity as an agent, leased the same to *Samuel Conant*, who by virtue of the said lease, entered upon the said premises, and continued in the possession thereof, under the said lease, until the 7th day of September, 1782. The certified copies of the records and proceedings of the probate office in the county of *Suffolk*, relative to the appointment and transactions of the said agent, are to be admitted as part of the case.

VI. That in and by an act entitled "an act to provide for "the payment of debts due from the conspirators and absen- "tees, and for the recovery of debts due to them," *Richard Cranch*, *Samuel Henshaw*, and *Samuel Barrett* were appointed a committee within and for the county of *Suffolk*, to sell the estates of conspirators and absentees lying in the said county of *Suffolk;* and in and by a resolve of the legislature, passed November 29, 1780, the same *Samuel Henshaw* and *Samuel Barrett*, together with *Ebenezer Wales*, were appointed a committee to sell the estates and effects of absentees, as in and by said resolve appears; and the said *Henshaw* and *Barrett*, two of the committee aforesaid, on the 7th day of September, 1782, contracted to sell the demanded premises to the said *Samuel Conant*, he then being in possession thereof, as tenant under the lease aforesaid, and thereupon made, executed and delivered to him the deed filed in this case.

[*This deed recites the authority given the committee to sell the estates of conspirators and absentees, after which* Henshaw *and* Barrett, *calling themselves a major part of the committee, for* 1000*l. convey the tenements to* Conant *in fee, with a general warranty in behalf of the commonwealth.*]

VII. That any gazette, containing any advertisement published in it relative to the sale of the premises by said committee shall be admitted as part of the case, and its legal operation be submitted to the court: that *Richard Cranch*, one of the said committee with the said *Henshaw* and *Barrett* was and is alive, but did not sign the said deed to *Conant:* and that *Ebenezer Wales*, who was mentioned in the resolve of November 29, 1780, as one of a committee with

said *Henshaw* and *Barrett*, is yet alive, but did not sign the deed.

VIII. That the deed in the case from *Samuel Conant* to *William Woods* was duly executed October 2, 1792. [*This deed releases to* Woods *the same tenements to hold in fee, with a warranty against the grantor and his heirs and all persons claiming under him or them.*]

IX. That the deed in the case from *Andrew Woods*, administrator of the estate of the said *William Woods*, by his attorney *R. G. Amory* to said *Richard Chamberlain*, was executed, under legal authority, by said attorney of said administrator May 1, 1801. [*This is a conveyance to* Chamberlain *in fee, with the usual covenants made by administrators selling land by virtue of license from court.*]

X. That at the supreme judicial court holden at *Boston* in and for the county of *Suffolk* on the third Tuesday of November, 1782, being the 19th day of said month, (and which continued in session until the 7th day of December then next) proceedings were had, and judgment rendered, as appears by the record thereof in the same court, of which a copy is filed in this case; which judgment remains unreversed; but no writ of *habere facias possessionem* has ever been sued out thereon: and it is agreed that the tenements described in said judgment and demanded in this writ are the same.

[*The judgment here referred to was rendered upon the suit, information or complaint of the government and people of the* Massachusetts Bay *in* New-England, *now stiled the* Commonwealth of Massachusetts, *against the said* Archibald M'Neil, *filed by* Robert Treat Paine, Esq. *their attorney general, in the court of common pleas, and brought by the appeal of the respondent to the supreme judicial court, where after one continuance the respondent was defaulted, and judgment was thereon rendered "that the said messuage, lands and appurtenances escheat, enure and accrue to the sole use and benefit of the commonwealth aforesaid, and that the said commonwealth recover possession thereof accordingly."—"*Suffolk, ss. Boston, Dec. 7, 1782. *Judgment is entered up according to the verdicts, and the court is adjourned without day."*]

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XI. That all acts, resolves and orders of the general court, and all treaties and laws of the *United States*, so far as the same are applicable to this case, are to be considered as part thereof.

XII. That the said *Archibald M'Neil* was not, after he went from *Boston* in March, 1776, ever an inhabitant of, or resident in *Massachusetts*, or in any other of the *United States;* and was not in peaceable possession of the demanded premises at any time after he went as aforesaid from *Boston*, but that the said *Andrew Black*, in his capacity of agent as aforesaid, the said *Samuel Conant*, as lessee under the said agent, and as purchaser under the sale and conveyance aforesaid from the said *Henshaw* and *Barrett*, two of the said committee, and the assigns of the said *Conant*, claiming under his title derived as aforesaid, have been in the actual possession of the demanded premises, ever since the appointment of the said *Andrew Black*, agent as aforesaid.

XIII. That the said *Henshaw* and *Barrett*, two of the said committee, received and accounted for the following sums and no more, on account of the demanded premises, *viz.* 1000*l.* in consideration of the sale to said *Conant*, as mentioned in the deed from said *Henshaw* and *Barrett* to him, 50*l.* 11*s.* received from said *Conant* for rent due before the sale, and 24*l.* 12*s.* 4*d.* from the said agent, *Andrew Black* for rent, amounting in the whole to the sum of 1075*l.* 8*s.* 4*d.*—And the debts allowed against the said *Archibald M'Neil's* estate, in pursuance of the provisions of the laws for that purpose, amounted to 1254*l.* 17*s.* 11½*d.*

XIV. That the demandant is a son of the said *Archibald M'Neil*, and one of his heirs, in the manner and proportion set forth in his declaration: that in March, 1776, he being under the age of twenty-one years, went from *Boston* with his said father, and continued with him until his death as aforesaid: and afterwards, *viz.* in 1789, returned to the *United States;* that he became of the age of twenty-one years, August 15, 1785.

XV. That the entries on the docket, and the affidavit of *Charles Cushing* the clerk, (if evidence of that nature be admissible in the opinion of the court) which is on file, are to

be considered as evidence in this case (notwithstanding any objection in point of form) relative to the time of entering up the judgment aforesaid.

If upon this statement of facts and evidence in the case, the court are of opinion that the demandant is by law entitled to recover the demanded premises, judgment is to be rendered in his favour: otherwise judgment is to be rendered in favour of the tenants, agreeably to the verdict of the jury; which is to be conclusive of the fact, that the judgment of confiscation was rendered before the date of the provisional articles, if the instructions of the presiding judge to the jury and his admission of evidence on that point, were correct; otherwise the court may order a new trial.

[*The judge states in his report, that evidence was offered from the docket, and from the testimony of the clerk, that the judgment was in fact entered up on the third day of the sitting of the court, which point was left to the jury upon that evidence, they being instructed that, there being* primâ facie *evidence that judgment was rendered before the signing the articles, it was incumbent on the party wishing to avoid the judgment, to shew that it was entered up after the signing of the articles: and being further instructed that the judgment must be considered in force until reversed by writ of error.*]

These points being thus settled, the cause was argued at the last July adjournment in this county, by *Dexter* and *T. Williams* for the demandant, and by *Bidwell, attorney general*, and *Davis, solicitor general*, for the tenants. As the opinion of the court was finally rested on the force and effect of the judgment of confiscation, it would be useless to state the other points urged by the counsel in arguing the cause, or the reasonings and authorities produced in support of those points.

The objections to the judgment made by the counsel for the demandant where principally 1. That it had never been carried into effect, no writ of *habere facias possessionem* ever having issued:

2. That having in fact been rendered after the provisional articles of peace were executed, it was *ipso facto* void.

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3. That the constitution of the commonwealth had virtually repealed the laws respecting conspirators and absentees before this judgment was rendered by force of those laws.

As to the first objection it was urged that until a writ of possession was issued and returned, the commonwealth could not be said to be seized, the whole title remained in the former owner(1). This position is fortified beyond contradiction by the different language adopted by the legislature in the act against conspirators, and in the act against absentees. In the former of these acts, the government and people are declared to be in the real and actual possession of the lands, tenements, &c. of the objects of the act, without further enquiry, adjudication or determination thereafter to be had. But in the act respecting absentees, provision was made for process, and trial by a jury, whereby to determine what estates were forfeited by force of the act; and if the jury returned their verdict that they found the estate proceeded against, or any part of it, forfeited, the court was directed to "proceed to give judgment thereon, and issue a writ of "*habere facias possessionem*, in behalf of the government "and people, *to cause them to be seized and possessed of* "*the same.*"

If the commonwealth has then never obtained legal seizin and possession of this estate, there is no privity between it and the present tenants, and they have no right to call it in aid of their defence.

2. By the provisional treaty [*Art.* 6.] it was stipulated on the part of the *United States*, that no future confiscations should be made. These articles bear date the thirtieth day of November, 1782. The judgment in this case appears by the record to have been entered on the seventh of December following. It could not then be lawfully entered, and it was *ipso facto* a void judgment.

3. It was insisted for the demandant that these statutes respecting conspirators and absentees, being inconsistent with the twenty-fourth article in the declaration of rights, were thereby virtually repealed. By the article referred to it is

(1) *Plow.* 484. 213. 386.—4 *Co.* 58.—1 *Wils.* 55.—*Dyer*, 108.—10 *Co.* 109.—2 *Black. Com.* 346. 315.

"declared that laws made to punish for actions done before "the existence of such laws, and which have not been de "clared crimes by preceding laws, are unjust, oppressive, "and inconsistent with the fundamental principles of a free government."

For the tenants, as to the *first* objection to the judgment of confiscation, *viz.* the want of a writ of *habere facias possessionem*, it was observed that a writ of execution is not a part of the judgment, but a consequence of it. It is mere process, and never enters into the consideration of the court in an enquiry whether a judgment is erroneous or correct.

At common law, the recoverer in a real action, where the demand is certain, may enter without a writ of *habere facias seisinam*. He may execute his own judgment; and the assistance of the sheriff is only to keep the peace(2). The judgment estsblishes the right, and the writ of execution is only of use where there is a counter possession.

Wherever an execution is necessary, the party, in whose favour the judgment is, may sue it out. He is entitled to it as a writ of right. The court may not, at their discretion, deny it. The provision in the absentee act, that the court *shall*, after rendering judgment, issue an *habere facias possessionem*, is no more than would have been implied, if it had, not been expressed in the act. It makes no change in the common law on this point. Upon any judgment the court are bound to issue the writ of execution adapted to the nature of the judgment.

In other statutes analogous expressions are used. For instance, the act describing the powers of justices in civil causes (3) declares that "upon all judgments given by a justice of the peace in civil actions, he shall award execution thereon in form by law prescribed." A similar declaration occurs in the act prescribing the method of satisfying judgments in favour of the Commonwealth(4): "a warrant of distress shall issue," &c. The law in these cases is mandatory to the court, but the writ of execution is not thereby made essential to the judgment, or to the right of the party established by

(2) 2. *Vin. Abr.* 15. *Tit. Execution* — 4. *Com. Dig. Execution, A.* 1. — *Co. Lit.* 34, *b.*
(3) 1783. *c.* 42.
(4) 1783. *c.* 58.

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the judgment. If he omits to sue it out, the omission does not invalidate his judgment. If an execution becomes unnecessary, by a voluntary payment of the debt, or a peaceable entry on the land recovered, the suing it out would be nugatory and an useless expense.

This was the fact in the case under consideration. The premises were defined in the judgment, and could not be rendered more definite by the execution of an *habere facias possessionem*. There was no adversary possession to be removed. The possession of *Conant*, the grantee of the Commonwealth with warranty, was the possession of the Commonwealth.

The whole object of the trial in this case was accomplished when the judgment was rendered, that object as declared in the statute being to determine what estates were forfeited and did escheat, *by force of that act*, and to give the persons described in the act an opportunity to have their property defended in the best manner their situation would admit of.

Neither at common law, nor by the statute, is a writ of execution essential to the validity of a judgment, or the perfection of the title. The king is in immediate possession, by office found, without entry or execution(5). So is the Commonwealth by our own statute(6).

In addition to this legal possession, which would have been sufficient, there appears to have been, in this case, by peaceable entry and occupation, an actual possession in the Commonwealth, and the grantee under the Commonwealth. In the strictest sense therefore, there was the *juris et seizinæ conjunctio*, which constitutes a perfect title. So that *Archibald M'Neil*, the demandant's father, was in his life-time divested, of his right, and did not die seized of the demanded premises.

To the *second* objection to the judgment, *viz.* that it was rendered after the date of the provisional articles of peace, it was answered, that the verdict of the jury was conclusive as to the fact, if the judge's admission of evidence, and his instructions to the jury were correct, on this point. The evidence admitted consisted of entries on the docket, and the tes-

(5) 3. *Black. Com.* 260.
(6) 1791, *c.* 13. § 3.

timony of the clerk. One of the entries was produced for the tenants. It stands immediately under the action, and is in substance that proclamation was made, the defendant defaulted, and judgment of confiscation rendered; but no day is mentioned. The other entry was produced and relied on by the demandant. It stands at the end of the docket, and is a general order of the court, at the close of the term, that judgment be entered up agreeably to the verdicts, &c. The testimony of the clerk was also produced by the demandant, and was excepted to at the trial by the tenants. A party can never object that evidence offered by himself was received, when it ought to have been rejected. The question, then, as to the correctness of the judge in admitting the evidence, is confined to the first entry on the docket; which was clearly admissible, as it contained the original, abbreviated minutes, from which the clerk made up his record at large.

The instructions of the judge to the jury included two propositions. 1. That the judgment was *primâ facie* rendered before the signing of the provisional articles. 2. That it was incumbent on the party wishing to avoid the judgment, on the score of its repugnancy to those articles, to shew that it was entered up after the signing of them. The last position results from the first, it being the very nature of *primâ facie* evidence, that it avails until the contrary is proved.—The former point, though more open to controversy, is equally favourable to the tenants. The judgment purports to have been rendered on the first day of the term. No other time is mentioned. This is the doctrine of the common law(7). And if we have in practice deviated from it, for any special purpose, such as that of supporting, against an intermediate lien, the title under an execution, extended within thirty days after final judgment, upon property attached upon mesne process, the deviation is only an exception from the rule.

The judge's admission of evidence, and instructions to the jury, being shewn to be correct, the verdict establishes the priority of the judgment of confiscation to the provisional articles.

(7) 4. *Co.* 71. *Hynde's case.*—*Cro. Car.* 102. *Standford* vs. *Cooper*.

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But if it had been otherwise, it is still contended that those articles were not the treaty of peace, from the date of which this and all other stipulations took effect. The provisional articles were never ratified; they were not a proper subject of ratification, being nothing more than a conditional agreement that, after a certain event, then future and contingent, there should be a treaty to be composed of those articles then agreed upon. The event, upon which they were to come into operation, a peace between *France* and *Great Britain*, did not take place until the January following.—Even after that event those articles were not to become a treaty, by virtue of the signing them in November, 1782; but a future treaty was to be formed, in which the articles, thus previously agreed upon, should be inserted. That treaty was accordingly formed September 3, 1783, and afterwards duly ratified. From that time only future confiscations were prohibited. In one respect it had been provisionally agreed, and was accordingly inserted in the definitive treaty, that the state of things at the date of the provisional agreement should be regarded. If any territories were conquered on either side, after that date, the conquests were to be mutually restored. *Expressio unius est alterius exclusio.* This express provision in one particular, and total silence in others, demonstrates that in other respects the treaty was not intended to have a retrospective relation to the date of the provisional articles.

But if the judgment against the demandant's father were repugnant to the treaty, and for that cause erroneous, and reversible for the error; yet, while it stands unreversed, it is conclusive upon the parties to it and their heirs, as to the subject matter of it. Whether erroneous or not, cannot be decided, by this or any other court, in a collateral action between other parties. It is a question, which can be considered only on a writ of error regularly brought for its reversal. This is a doctrine so well established and understood, that it would be a waste of time to produce authorities in support of it. To examine, in such an indirect and collateral manner, the merits of a solemn judgment of this court, the highest judicial tribunal in the Commonwealth, would be an evasion of a record, and a prostration of first principles.

As to the suggestion that the acts of confiscation were virtually repealed by the twenty-fourth article of the declaration of rights, it was answered, that at the time these acts were made, no such restriction existed ; the legislature was absolute and uncontrouled ; this article can have no retrospective operation ; and if it could have, it is confined to prosecutions for crimes, and in the case of *Martin* vs. *Commonwealth* [*ante vol.* 1. 347.] it was held that absentees were not criminals. These acts formed a part of a system of measures thought necessary by those who had the right to determine what was necessary to effect the great end then in view, the independence of these states.

The counsel for the tenants insisted also that the demandant was an alien at the time of his father's death, and so incapable of taking by descent.

In answer to an enquiry from the bench, whether alienage must not be pleaded in abatement, and whether advantage could be taken of it under the general issue, it was said : The objection is not made to the demandant's capacity to bring the action. If it were, it must have been pleaded in abatement. By omitting so to plead it, the right of taking that exception is undoubtedly waived. Whether before the commencement of this suit, the demandant had, by naturalization, become capable of suing such an action, is a question, which cannot now be raised in this action. But as a descent of the demanded premises from his father to himself is one of the essential links in his chain of title, his capacity to take by descent is a point involved in a denial of his right. If he was not capable of inheriting, he certainly did not inherit, and therefore has no such title as he has counted upon. It goes directly to the merits of the case, and makes a material part of the general issue.

For the demandant in reply it was said that the fact assumed on the other side, *viz.* that the Commonwealth was in possession of this estate at the time of the judgment of confiscation, was untrue. If *Conant* had before been in possession as tenant to the Commonwealth, yet for several months previous to this period, he was in claiming, as a stranger, a fee simple in his own right, which he had purchased of the com-

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mittee. His possession can then, in no sense, be the possession of the Commonwealth. If it had been the Commonwealth's title, which the committee conveyed, still the purchaser was in no sense tenant to the Commonwealth. But it was not the title of the Commonwealth, but of *M'Neil*, which *Conant* purchased. How then can this judgment unexecuted go to confirm the estate of this stranger to it?

In former times, livery of seizin constituted the whole of a conveyance of land. When learning became more general, the feoffment was adopted; but still livery must accompany it: and to this day possession is necessary to perfect every conveyance, except those which have been devised under the statute of uses. This is not only true of conveyances *in pais*, but those which are effected by matter of record, as fines and recoveries, are incomplete until actual seizin and possession.

In this state a deed duly executed, acknowledged and recorded is, by statute, made tantamount to livery and seizin. But in every case, where this statute does not apply, the old doctrine remains. In real actions the demandant must count on the seizin of himself or his ancestor; no title can be derived either to the king or a subject without seizin, unless by virtue of some statute. It is true that upon an office found, the king is deemed to be in possession without execution. But our legislature in the statute provision under consideration have renounced this prerogative, for they direct that a writ of *habere facias possessionem* shall issue "to cause the government and people to be seized and possessed of the same;" which clearly shews their understanding to have been that they would not be legally seized and possessed without such writ. The direction is absolute and applies to every case which should arise under the statute. It was peculiarly necessary to be observed in this case, where the estate was not vacant, but a stranger was in full and quiet possession. If the requisition had been of a thing useless and frivolous, it would not be for this court to dispense with it as unnecessary, claiming to be wiser than the legislature.

The objection in this case is not to the judgment. That was complete; but the *confiscation* was incomplete. And this is the only mode in which the demandant can avail himself

of the defect. It is not pretended to be error that an execution does not issue upon a judgment. But to make a confiscation complete, possession must be taken. The very term implies the transferring the property confiscated into the *Fiscus* or public chest.

The second point stated in the opening of the argument for the demandant is still relied on, *viz.* that this judgment of confiscation, being rendered after a solemn treaty had provided that no future confiscations should take place, was *ipso facto* void, and a mere nullity. The date of the preliminary articles is the true time from which the definitive treaty takes effect. This is true in fact and constant practice, and it must be true from the reason of the thing. Otherwise it would never be the same compact which was at first made and afterwards confirmed and ratified. The subjects of the compact may have essentially varied in the interim. And in this case if after signing the preliminary articles, the courts here went on confiscating, it was a manifest breach of contract.

It was suggested that the demandant must procure a reversal of the judgment by his writ of error, before he can have advantage of this point. But if a court has undertaken to render judgment upon a matter, of which it had no jurisdiction, surely the party is neither bound by such judgment, nor driven to his writ of error to obtain its reversal.

But it has been endeavoured to be shewn in this case that this judgment was in fact rendered previous to the date of the provisional articles. It cannot be denied that in the English courts judgments are always considered as rendered on the first day of the term. But the presumption here is directly opposite ; and every judgment is held to be of the last day of the term, unless in any particular case the record contradicts the general presumption. There is nothing in the record to take this case out of the general presumption. On the contrary the judgments on the verdicts are expressly said to be entered up on the ninth of December.

If the treaty had not put a stop to further prosecutions under these laws, it is contended that our constitution had virtually repealed them. If this argumsnt is now urged for the

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first time, yet it will not be less attended to on that occount, if it appear to be founded in truth and reason.

That anterior to the adoption of our constitution the legislature had authority to enact these laws is not denied: and no friend to our happy revolution will be disposed to scrutinize too severely into the measures which were at the time thought necessary to effect it. It is time however to be on our guard against confounding revolutionary measures with those which are to be approved and adopted, when the revolution is completed, and fixed, and stable principles of jurisprudence are looked to as its best fruit. It is important not to cover with the glory of that revolution, principles which will not stand the test of justice and morals. In future times, times perhaps nearer than we are aware, it will be well that we have guarded ourselves from the mischievous consequences of such impressions. In such times, evil disposed persons will eagerly avail themselves of precedents, which shall not have been discountenanced: Victims will not placate them: they will rather increase the appetite than satiate it. It is then of vast importance to set up now, while moral principles are respected, the standard of truth and justice, to which, in future times of trouble and dismay, we may appeal for our defence and safety. With this view the practice of confiscating the property of persons who had committed no known crime must be discountenanced, as incompatible with the 24th article in our declaration of rights, which has been before referred to. That section, the demandant contends, virtually repealed the acts imposing these penalties, and thereby annihilated the jurisdiction of the courts of law arising under them. The people, in the most solemn act of sovereignty they are capable of exercising, have declared these laws to be "unjust, oppresssive and inconsistent with the fundamental principles of a free government." And will this court, in direct opposition to this declaration, still go on executing them.

The constitution of the United States has prohibited the several states from making any thing but gold and silver a tender in payment of debts; from passing any *ex post facto* law, or law impairing the obligation of contracts: and the construction has uniformly been, that all laws then existing, which

militated with this prohibition were virtually repealed by it. It is not here contended that prior confiscations were avoided, but only that all further proceedings were prohibited.

These laws were certainly made to punish for actions done before the laws were passed, and very severe are the punishments inflicted by them, notwithstanding what dropped from one of the court in the case of *Martin* vs. *The Commonwealth*, that confiscation was rather to be considered as the application of the existing laws respecting aliens, than as a punishment of a crime. The laws might have declared those absentees to be aliens, and forbidden their return, without following the declaratian with such severe forfeitures. It is true that, by the common law, upon the conveyance of an estate to an alien, it immediately escheats to the crown. And Dr. *Blackstone* observes that this seems intended by way of punishment for the alien's presumption in attempting to acquire any landed property.

But the case here was widely different. The demandant's father was a natural subject of the king of *Great Britain* from his birth. To that sovereign his allegiance was undeniably once due: and no laws of any country ever yet made a subject's continuing his allegiance to be treason, which is always a breach or violation of his allegiance. This man certainly never owed allegiance to the state of *Massachusetts*. When he did what the legislature afterwards saw fit to punish as a crime, there existed no law making his conduct criminal, or attaching any forfeitures or disabilities to it. Those acts were in direct contradiction to the sound principle contained in the article of the constitution so often alluded to, and, if that article is allowed its full operation, they were *ipso facto* annulled and repealed by it. It is worthy of remark here, that the provision in the constitution for continuing the laws then in force is expressly confined to such of them as were not repugnant to the rights and liberties contained in the constitution. It seems too plain, to require argument to support the position, that if the laws in question were repealed by the adoption of the constitution, the after proceedings of

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the courts under them were entirely null, and may therefore be avoided by plea; and it cannot be necessary to resort to a writ of error.

The alienage of the demandant seems hardly capable of a distinct consideration. If this confiscation was valid, there is nothing left worth his contending for, although if he were an alien, it would not follow that his estate was divested unless an office had been found. In the act, in which the demandant's father is named, the only avowed object was to prevent the return into this state of the persons named. But the counsel for the tenants will have the two statutes taken together, and construed as one. If this is to be the course, it will be remembered that the first act has expressly required an inquest of office, and by its provisions no confiscation is complete until the judgment is executed.

If the demandant is an alien, it may be asked at what period of his life he became such. He was not so at his birth; he was not so at the time of the descent cast by his father's death. Although the statute has made his father an alien, it has not made the demandant one. This latter left the country an infant: he had no power to elect to which of the parties he would render his allegiance, for he was under his father's coercion. He was an infant when his father died. When then did he become an alien? He never perpetrated any of the acts enumerated in the statute. Will his not returning after he came of age constitute him an alien? He was never required to return, nor has the government ever declared him an alien.

The cause stood continued for advisement, and now at this term the opinion of the court, (*the chief justice* excepted, who had been of counsel in the action,) was delivered as follows by

SEDGWICK, J. By the agreement of the parties, the circumstances, which took place at the trial, are not, in the view which I have taken of the case, important to be stated; as every fact necessary to a right decision of this case appears in the state of facts which the parties have agreed upon, *that the controversy between them may be finally settled upon principles of law.*

The demandant counts on the seizin of his father *Archibald M'Neil*, his death, that he is his son and heir, and that the title to the demanded premises descended to him.

On the part of the tenants it is agreed that *Archibald M'Neil*, the father became legally seized in fee of the demanded premises in 1753, and continued so seized until March, 1776: that the demandant is his son, and one of his heirs, as set forth in the count. To stop here, the right of the demandant to recover would be indisputable.

On the part of the demandant it is agreed that in March, 1776, *Archibald M'Neil* became an absentee, as described in the act of the 30th of April, 1779: that he never afterwards returned into this state, or into any other of the *United States*, until after the treaty of peace between the *United States* and the king of *Great Britain*: and that he never was, in fact, afterwards an inhabitant of, or resident within *Massachusetts*, or any other of the *United States*, nor ever after he left the country, in the possession of the demanded premises.

It is further agreed that *Andrew Black*, being duly appointed by the judge of probate, in pursuance of, and in conformity to the act of 1777, to prevent waste, &c. of the goods or estate of absentees, and for the payment of their just debts, entered into, and took possession of, the demanded premises, as estate left by *Archibald M'Neil;* and being so in possession, leased the same to *Samuel Conant*, who by virtue thereof continued in possession until the 7th day of September, 1782: that on the day last mentioned, *Samuel Henshaw* and *Samuel Barrett*, two of a joint committee of three, appointed by a resolve of the legislature, to sell the estates of conspirators and absentees lying in the county of *Suffolk*, contracted to sell the same to the said *Samuel Conant*, and thereupon made, on the same day, a conveyance thereof to him in fee, that the tenants derive a title from *Conant* to themselves by several mean conveyances, and that the actual possession has ever been in conformity thereto: that at the supreme judicial court holden at *Boston*, in the county of *Suffolk*, which commenced on the 19th day of November, 1782, and continued in session until the 7th day of the ensuing December, a regular judgment was rendered

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that the demanded premises did, conformably to the act of the 30th of April, 1779, escheat, enure and accrue to the government. This judgment has not been reversed; but no writ of possession was ever issued upon it.

The provisional treaty, which is submitted to, and if it was not, it would be the subject of, the consideration of the court, was signed by the respective plenipotentiaries of the *United States* and *Great Britain* on the 30th of November, 1782. By the sixth article of which it was agreed that there should be "no future confiscations."

It appears by the agreement that the demandant was born on the 15th of August, 1764: that in March, 1776, being the 12th year of his age, he went with his father, and that he continued with him until his death in July, 1784, that is, until after the ratification of the definitive treaty of peace, and that the demandant did not return to the *United States* until the year 1789.

There are several facts stated in the agreement, which I have omitted, because they have no influence on the judgment which I shall pronounce.

There are two circumstances, upon which the counsel for the tenants rely.

1. The judgment of the supreme court in November, 1782, whereby the demanded premises, conformably to an unrepealed law were adjudged to escheat, enure and accrue to the government of the state. And

2. That the demandant is an alien, and has not a right to support a claim, in a court of justice, for an estate of inheritance.

As to the judgment, there cannot be a doubt but that it must be conclusive against the demandant, provided the objections, which are stated against it, do not prevail.

The first objection against it is, that it was incomplete until it was executed by a writ of possession.

That a man, who has a judgment for possession, may enter without a writ, is common learning, and indeed is not denied. And why should the commonwealth, which cannot be disseized, the whole people, require the aid of an officer to give them actual possession, when it is not necessary in the case of an individual? The highest evidence of title, that

can exist, is the solemn judgment of a court. When then this judgment says that the demanded premises, which were the property of *Archibald M'Neil*, have been forfeited by him, and have escheated, enured, and accrued to the government; if this be not evidence that his title was taansferred to the government, we must abandon the idea of the absolute verity of judgments.

When the finding of an office is necessary to give validity to a forfeiture, no other act is necessary; as in the case of an alien. He may purchase and hold until office found, and no longer(8); for thereby the property vests in the government. And so it is also, in other cases of forfeiture(9). Now the judgment in this case must be at least equal to finding an office.

But it is said that the necessity of a writ of *habere facias possessionem*, to give validity to a judgment, and to put the government in possession, is apparent from this consideration, that the conspirator's act, which passed on the same day that the absentee act did, declares that the government shall "be taken, deemed and adjudged to be in the real and actual "possession of their estate, any thing in the act for confisca-"ting the estate of certain persons commonly called absentees, "or any other law notwithstanding;" while in the latter act the court is directed, when judgment shall be given against an absentee, to issue a writ of *habere facias possessionem.*

I can easily perceive a difference as to the *expediency* of issuing a writ of possession in the case of an absentee, and omitting to do it in the case of a conspirator. In the former case, one in possession of the estate of an absentee might have no knowledge of a judgment against him; but in the latter, the right of the government was declared by a public law, which might be reasonably presumed to be known to every one. In the one case therefore it might be *convenient* that a writ of possession should be issued; while in the other it would be wholly unnecessary and superfluous.

But it is impossible for me to believe that the legislature deliberately intended so to alter the principles of the common law, as to determine, that when the title of the government

(8) *Co. Lit.* 2 *b.*
(9) *Plowd.* 229. 230. 484.—3 *Rep.* 10.

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was established by a solemn judgment, although there could be no opposing of possession, (for the government connot be desseized), yet that a writ of possession was necessary to complete the title. If it had been intended, in fact, to deny to the government the exercise of their right to enter into their property, an explicit declaration to that effect, it is reasonable to suppose, would have been, by negative words, inserted in the act.

It is therefore our opinion that the issuing of a writ of possession on such a judgment was intended as merely *mandatory*, and not necessary to complete the *absolute* title of the government.

A further objection is made to this judgment, that, although the term of the court, at which it was rendered, commenced before the date of the provisional treaty of peace, yet it is probable that the judgment was rendered afterwards; and that, in that case, the confiscation law being virtually repealed, there was no foundation, on which to rest the judgment.

The *provisional* treaty was never, I believe, ratified by either the *American* or the *British* government: and whether it is of itself, a contract binding on the two countries from the date, or at all; or whether it was intended merely as a specification of what should constitute the *definitive* treaty of peace, and, when inserted therein, was *functus officio*, and otherwise inoperative, I give no opinion: but whatever may be the construction in this regard, I cannot entertain a doubt that the judgment, so long as it remains unreversed, is, to all intents and purposes, valid and effectual.

This judgment, as presented to us, is in form perfectly regular. It purports to have been rendered, on a statute of the government, by a court, which not only had jurisdiction expressly given by the statute, but jurisdiction paramount to any other court. And the judgment, on the face of it, appears to have been rendered previous to the date of the treaty, by which it is said to have been rendered void: and it has not been reversed by a court of law. The judgment appears to have been rendered on the *nineteenth* day of November, 1782; and the provisional treaty was dated the *thirtieth* day of the same month. But it is said, that al-

though the judgment was rendered by the court *holden* on the 19th day of November, yet it continued to be *holden* until after the date of the provisional treaty: and that the judgment was, in fact, rendered posterior to that date. And it is further said that, but for the misdirection of the judge, that fact would have been established on the trial.

But we are of opinion, that it was not competent to the demandant, by such means, to prove the invalidity of the judgment, or that it was void. The tenants produce the judgment of a court of record, as evidence of a fact on which they rely; and at the same time shew a statute authorizing *that* court to render such a judgment. In answer whereto, the demandant says, that he can prove that the statute was repealed at the time the judgment was rendered; not by the legislature which enacted it, but *virtually* by a national treaty; and not *expressly* by that, but by necessary implication.

First then, to attain the object, an issue of fact is to be tried to prove that the judgment was not rendered, when it purports to have been; and if the demandant should be successful in that, the court is then to proceed to determine that the statute, at the time the judgment was in truth rendered, had been *virtually* repealed by the treaty. There is no precedent, whereby the force and effect of a judgment have, by such mode been avoided.

If it be true that the provisional treaty is to be considered as a national contract, binding independent of the definitive treaty; that it operated a repeal of acts of confiscation; and that the judgment against *Archibald M'Neil* was, in truth, rendered after the date of that treaty: the demandant should have brought his writ of error, established the fact, and the judgment must have been reversed. But I know of no rule of law, by which, on a trial of his *right* to the land, he can do what is tantamount to a reversal of the judgment, which, admitting its validity, is conclusive against him. There are, it is true, instances in which judgments of court are void, and may be so considered without reversal; but it is only in cases, where, *from the judgment itself*, it is apparent that the court had not any jurisdiction, but had exercised that, which belonged to another tribunal. But in this case there

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are no circumstances, by which that principle can be applied.

There is one more objection made, which is that the acts of confiscation were virtually repealed by the adoption of the constitution. And to prove this, the 24th article of the declaration of rights was cited in the argument, and, with great force and eloquence, pressed upon the consideration of the court. That article is in these words, "Laws made "to punish for actions done before the existence of such "laws, and which have not been declared crimes by preced-"ing laws, are unjust, oppressive, and inconsistent with the "principles of a free government," It is said that the absentee act *was made to punish for actions done before its existence, which had not been declared crimes by preceding laws, and that it is therefore unjust, oppressive, and inconsistent with the fundamental principles of a free government:* that those who framed the constitution having declared the law in question to be unjust, oppressive and hostile to liberty; and the whole people, by their adoption of it, having sanctioned and confirmed this declaration, it operates a virtual repeal; and that it would be absurd that a law so opposed to the principles of the constitution, and so pregnant with evil, should be carried into effect by judicial authority.

If it be admitted that the constitution virtually repeals the law in question, it certainly follows that the judgment *against Archibald M'Neil* is erroneous, and that it might be reversed: but it does not prove that it is therefore a mere nullity, which can be taken advantage of in this way. This would be inconsistent with all the ideas I have entertained of the solemnity and efficacy of judgments rendered by courts of competent jurisdiction.

But I do not believe that the constitution did, as the demandant's counsel suppose, virtually repeal the confiscating acts. Whether these acts were intended to punish those who were the subjects of them; or whether they were political regulations growing out of the circumstances of the times, and supposed to be authorized by those circumstances, need not now be determined. The restraint, which was intended upon the powers of the legislature, by this article of the declaration

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of rights, could not, I am perfectly satisfied, operate to repeal those laws; but was intended to direct the conduct of the legislature acting under the constitution. The constitution must be construed according to the intention of those who framed, and those who ratified it: and I believe I may safely affirm that it never entered into the mind of an individual, at the time, that conspirators and absentees were to derive from the constitution an exemption from the pains and forfeitures, which had been prescribed against them.

As we think the judgment, in this case, is conclusive against the right of the demandant, it has become unnecessary to proceed and consider, whether, by the facts disclosed, it appears that he is an alien, or whether, if so, his alienage might have been pleaded in bar, or given in evidence under the general issue. Upon these points we give no opinion. Being satisfied that the judgment of the court is in force, and that, so long as it continues in force, it is conclusive evidence against the right claimed by the demandant; he is not by law authorized to disturb the possession of the tenants, whether that possession, in its original commencement was attended by a lawful title or not.

Judgment must be entered for the tenants.

JOHN CAPEN *versus* SAMUEL K. GLOVER AND OTHERS.

Ministerial lands lying in *Milton*, but belonging to *Dorchester*, are not liable to be assessed in the town taxes of *Milton*.

THIS was an action of trespass pending in the county of *Norfolk* against the defendants, assessors of the town of *Milton*, in that county, for a supposed illegal assessment of certain lands lying in *Milton*. The parties (October term, 1805,) agreed upon the following statement of facts, on which judgment was to be rendered.

"That previous to the year 1659, the towns now called *Dorchester* and *Milton*, were one township under the name of *Dorchester*, and that on the sixteenth day of the eleventh month in the year 1659, the inhabitants of the said town of

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Dorchester, or proprietors of the common lands of *Dorchester*, (*Dorchester* and *Milton* being then one town), at a legal meeting of said proprietors, did give, sequester and set off forever, four hundred acres of land, to the use and maintenance of the ministry of the said town of *Dorchester*, to wit: two hundred acres thereof for the use of the inhabitants thereof on the north-west side of the river *Neponset*, and the other two hundred for the inhabitants of *Dorchester*, that live on the south-west side of said river *Neponset*. All the said lands so set off for the use aforesaid, lies in that part of *Dorchester* which is now called *Milton*. In the year 1662, the inhabitants of *Dorchester* at a legal town meeting, voted that that part of the town, which was then called *Unquity* or *Uncataquisset*, now *Milton*, should be a township by themselves, if the general court should consent thereunto, under certain conditions and restrictions; among which was the following: "*Provided also that all that land, or any* "*of their estates inhabiting upon the land, reserved for* "*the maintenance of the ministry in* Dorchester, *both it or* "*they shall not be charged to any common charges by our* "*neighbours at* Unquity." Afterwards in the same year the inhabitants of *Unquity* by their agents, petitioned the general court that they might be a township, *according to the terms and tenor of the grant from Dorchester*, to which the general court assented. From the time of the separation of the town of *Milton* from that of *Dorchester* in 1662, the said ministerial land belonging to the inhabitants of *Dorchester*, for the use aforesaid, was never taxed by the inhabitants of the town of *Milton*, for the support of their town charges, until the year 1802, and which tax is the cause of this suit. The said town of *Dorchester* have always, after receiving the rents and profits of the said land, appropriated the same towards the payment of the salary they vote to give their minister."

It was thereupon agreed by the parties that if the said town of *Milton* could not, in the year 1802, by law assess the occupant of the said land of the said town of *Dorchester*,

lying in the said town of *Milton*, holding the same as tenant for years under the said town of *Dorchester*, to the town taxes of the same town of *Milton*, then judgment should be rendered for the plaintiff to recover the sum of twenty-five dollars and forty-one cents damage with costs: otherwise judgment should be rendered for the defendants for costs.

The chief justice having been of counsel for the defendants before his appointment to the bench, the cause had been continued in *Norfolk* for want of a competent number of judges to hear and determine it. At the last October term at *Dedham*, it was continued *nisi* for argument, and at this term it was briefly spoken to by *Dexter* for the plaintiff, and *Wheaton* for the defendants. After which the opinion of the court was thus delivered by

SEDGWICK, J. This is an action of trespass against the defendants, assessors of the town of *Milton*, for a tax for town charges imposed on the plaintiff, as the occupant of a tract of land in that town.

When *Milton* was erected into a town, (having before been part of *Dorchester*) which was one hundred and forty years before this tax was imposed, it was manifestly the understanding of all the parties, that the land, for which this tax was assessed, although it lay within the limits of *Milton*, should be exempted from taxes for town charges, it being reserved to *Dorchester* for ministerial purposes. This was not an unreasonable agreement. The act for the incorporation of *Milton* recognizes the agreement under the expression of "the terms and tenor of their grants from *Dorchester*." We think this operates the exemption claimed by the plaintiff: and we think too that the length of time, during which the town of *Milton* has forborne to tax any one for this land, is sufficient, of itself, to justify the plaintiff's claim.

Judgment for the plaintiff.

JOSEPH FOSTER AND AL. ASSIGNEES OF JAMES ANDREWS, A BANKRUPT,

versus

JOHN LOWELL, ESQ.

Where money belonging to A. is in the hands of B. who also held a demand in favour of a creditor against A. with directions to make an attachment of A.'s property, it was agreed between A. and B. that B. should retain the money for the use of A.'s creditor, and that B. should cause A.'s property to be attached, and that this agreement should be reduced to writing: this was not done, and A. becoming bankrupt his assignees recovered the money of B. in an action for money had and received.

ASSUMPSIT for money had and received. Upon the trial of the cause before *Parker, J.* at the last November term in this county, the following facts were in evidence, as appears from the judge's report.

The defendant was assignee of the estate, &c. of two bankrupts, viz. *Ebenezer Lewis* and *Elijah Williams*; on which estates two dividends were declared, one on the eighth of July, 1802, and the other on the twelfth of September, 1803. *James Andrews* was a creditor to both estates, and the dividends belonging to him in Mr. *Lowell's* hands amounted to 364 dollars 34 cents for which sum a verdict was rendered in this case.

In January, 1803, a commission of bankruptcy issued against said *Andrews*, on an act of bankruptcy committed after the first order of dividend above mentioned, and the present plaintiffs were duly appointed his assignees, and an assignment of all his estate, effects, &c. was duly made by the commissioners to them.

Before the bankruptcy of *Andrews*, and before said first dividend was declared, there was placed in the hands of Mr. *Lowell*, a demand in favour of *the Salem Marine Insurance Company* against said *Andrews* for collection; upon which demand a writ was issued, and given to an officer, with directions to obtain security. When the officer called to make service of the writ, which was on the fifth of April, 1802, *Andrews* went to Mr. *Lowell*, and agreed with him that the money, which should come into his hands, as assignee to *Lewis* and *Williams*, belonging to *Andrews*, should be retained by *Lowell*, on account of this demand of *the Salem Insurance Company*, and further agreed to assign over to said *Company*, or to said *Lowell* for their benefit, his claims on said estates, of which said *Lowell* was assignee as aforesaid.

No attachment was made in the suit against said *Andrews*, but the action against him was entered and prosecuted until his bankruptcy. No assignment was executed by *Andrews:* and no further transactions appear to have taken place between him and said *Lowell.*

On the tenth of January, 1804, the said *Insurance Company*, by *Jacob Ashton*, Esq, their president, proved their debt against said *Andrews* before the commissioners of bankruptcy, having deducted 320 dollars, as the probable amount of the money in Mr. *Lowell's* hands from the estates aforesaid. Mr. *Lowell* being then in *Europe*, it did not appear that the company knew the amount of the said dividends, or of the nett proceeds thereof, which might belong to them.

If upon these facts the plaintiffs ought to recover the amount of both dividends, judgment to be rendered according to the verdict: if they ought to recover any part, then the verdict to be altered accordingly: if they are not entitled to recover any thing, a general verdict to be entered for the defendant, and judgment for his costs.

The cause was argued at this term by *C. Paine* for the plaintiffs, and by *Jackson* and *Dutton* for the defendant.

Dutton, being called on by the court to shew that the assignment of *Andrews* to *Lowell* was a valid one, contended that the assignment being made *bonâ fide*, and for a valuable consideration, was sufficient to pass the property. *Andrews* was then in good circumstances, and had a right to appropriate this money to the payment of the debt he owed the company, without incurring the imputation of fraud upon his other creditors. He certainly could not disaffirm a contract thus fairly made, and the plaintiffs, his assignees, are but the successors to his rights and duties, and they take subject to all the bankrupt's equity(1).

In the case of *Lempiere* vs. *Pasley*(2), there was an assignment of goods at sea before the bankruptcy, but the bill of lading, not being at hand, was not endorsed until after the bankruptcy: yet the assingment was held good. Our case

(1) *Ex parte Dumas.* 1 *Atk.* 232.—*Hatch* vs. *Brooks, ante vol.* 2, 293.
(2) 2 *Term R.* 485.

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is stronger than that, as here the property was actually in the defendant's possession.

Where a parole agreement is in part executed, it need not be reduced to writing(3). Here *Andrews* may be said to have executed this contract in part by leaving the money in the defendant's hands, and omitting to demand it. The defendant executed his part of the agreement by rescinding his orders to the officer to obtain security of *Andrews* by a special attachment of his property.

If, however, the court should be of opinion that writing was necessary to the validity of this contract: *Andrews*, whose fault it was that no writing was made pursuant to his engagement, is estopped and so are his assignees, from making the exception.

Paine, for the plaintiffs, insisted that this property, being merely contingent, was not assignable(4). No dividends had been ordered, so the amount pretended to be assigned was unascertained. Such an assignment might possibly be good as against *Andrews* himself: but certainly, not as against his assignees, whose whole interest and duty is in behalf of the creditors.

But if it had been assignable at law, yet it was never in fact assigned: not even in the understanding of the parties. *Andrews* retained the notes, his only title to the dividends, which would have been delivered to the defendant, had they intended an actual and real transfer of the debt. It is found in the case also that a written assignment was intended, as supposed necessary to complete the contract. It does not appear that the defendant ever endorsed the monies received upon the note of *Andrews* to the *Insurance Company*, which he would very naturally and properly have done, had he considered them as validly transferred(5). Nor is there any evidence that the company, the real creditors of *Andrews* ever assented to the transaction, or even knew of it. It was, in truth, but a proposed bargain, intended to have

(3) *Earl of Aylsford's case*, 2 *Str.* 783.—*Floyd* vs. *Buckland*, 2 *Freem.* 268.—*Leake* vs. *Morris*, 2 *Chan. Cases*, 135.—1 *Fonblanque*, 179, 180. 187.
(4) *Fonblanque*, 202. *note* g. *and the cases there cited.*
(5) *Perkins* vs. *Parker*, *ante vol.* 1. 117.

been concluded, but never matured. A material part of the bargain, *viz.* that the agreement should be reduced to writing, and executed by the parties to it, was never carried into effect: this never having been done, the whole was void.

The case of *Lampriere* vs. *Pasley* was very different from the case at bar. There every thing was done, which was then in the power of the parties. All the papers, which the debtor possessed, were passed over to the creditor.

But should the opinion of the court incline to support this transaction, still we say that the defendant can retain no more than 320 dollars, the amount credited by the company, when proving their claim upon *Andrews* before the commissioners.

Jackson, in the close, read the opinion of the court of king's bench, as delivered by *Ashurst, J.* in which he considered that the principles, which would support the present defence were fully maintained.

Whether this was a valid assignment or not, it gave to the company a legal lien on the money in the defendant's hands. They relinquished a security in their hands, gave up a pledge, in consideration of which it was agreed that this money should stand pledged. This was no contingent debt, except as to its amount. If as in the case of *Hatch* vs. *Brooks*, an assignment by writing without seal was valid, it was equally so by parole, if not within the statute of frauds. It was however agreed to be put in writing, and nothing but the laches of *Andrews* prevented it. It does not lie in his mouth then, nor in that of his assignees to take the exception. The only difficulty is as to the difference between the sum in the defendant's hands, and the sum deducted on that account by the company. But this admits of an easy adjustment by the commissioners, before whom the parties must again appear, whatever may be the decision of the court in this case.

The opinion of the court (excepting *the chief justice*, who having been of counsel, did not sit in the cause) was afterwards delivered by

SEDGWICK, J. [After reciting the facts, as before detailed.] The question arising in this case is between the creditors of *Andrews* generally, and one of them, *the Salem Insurance Company*, who is entitled to the money?

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We have been disposed, if we could have done it consistently with the rules of law, to give validity to the agreement between *Andrews* and the defendant; because we believe it was a fair and honest transaction. But when we consider that the parties themselves, at the time of the agreement, contemplated an assignment, which was never made, as the completion and evidence of their contract; that no memorandum in writing was at the time made of the agreement; that neither of the dividends had ever been paid or credited by the defendant to the insurance company, although one of them had been received by him before *Andrews* became a bankrupt; we think that to sanction such loose, incomplete and unexecuted contracts, in the cases of bankruptcy and insolvency would authorize practices extremely mischievous. We think therefore that the verdict must stand.

Judgment according to the verdict.

THE INHABITANTS OF ARINGTON, PLAINTIFFS IN ERROR,

versus

THE INHABITANTS OF BOSTON.

Before the statute of 7 *Geo.* 3. c. 3. a mariner gained a settlement in a town, by making his home therein, and following the business of his profession therefrom.

ERROR to reverse a judgment of the court of common pleas for the county of *Plymouth*, August term, 1806, rendered upon the complaint of the plaintiffs in error, in which they prayed that the legal settlement of *Thomas Seymour*, a pauper, and his wife, might be adjudged to be in *Boston*.

The evidence in the case, as stated in the common pleas pursuant to the statute was, "that the said *Thomas Seymour*, the pauper, was born in *Boston* in September or October, 1743: that his father was a native of *England*, and his mother of *Rhode Island*.—The father lived in *Boston* at the time of the birth of the pauper, and previous thereto, and died there.—Some time after the pauper lived in *Boston*, *Dorchester* and *Braintree*, until he was fifteen years of age, when he entered as a soldier in the provincial service against the *French*. In 1763, he was discharged from the service, return-

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ed from *Nova Scotia* to *Boston*, resided there two or three days, and from thence went to *Barnstable* in the county of *Barnstable*, where he engaged in the business of a mariner, in the whale fishery, in *West-India* and coasting voyages. He continued in *Barnstable* about two years, boarding with a Mr. *Fuller* a selectman of that place, when on shore, which did not exceed six weeks or two months at any one time. He then removed from *Barnstable* to *Sandwich*, where he continued following the same business as at *Barnstable*. *He made his home at* Sandwich *until some time after the year* 1767, during which time he once resided on shore at *Sandwich* six months at one time; being confined with a wound in his leg.

The said pauper was not warned to depart from either of the towns of *Barnstable* or *Sandwich*, during his residence in those towns respectively.

Upon these facts the court of common pleas adjudged that the legal settlement of the pauper and his wife was not in the town of *Boston*.

To reverse this judgment, and to obtain a judgment of this court that the settlement of the said paupers is in *Boston*, this writ of error is brought.

G. Blake, for the plaintiffs in error, argued that the pauper, having originally had a legal settlement in *Boston*, could not lose that settlement but by gaining a new one in another town. He could not lose it by going into his country's service as a soldier. His removal to *Barnstable* and *Sandwich* was only for the more convenient exercise of his business as a mariner, and the case finds that he never resided at either of those places for more than six weeks at any one time. As to the expression that *he made his home at Sandwich*, it must be taken in connection with the other facts, which shew that he was all the time a transient, sea-faring man. His confinement by lameness for six months at one period, being a providential misfortune, cannot effect the legal rights of the parties.

By the law(1) then in force in this government, no stranger coming into a town could gain a settlement, so as to charge

(1) 12 & 13 *W.* 3 *c.* 10.

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such town with his support in case he became a pauper, but by twelve months residence without warning, or the approbation of the selectment or of the town. It is true this man was never warned from *Barnstable* or *Sandwich*, but then the transient desultory residence of a sailor constantly employed in sea voyages is not such a residence as must have been contemplated by the statute.

Thatcher, for the defendants in error, acknowledged that it was incumbant on them to shew that the pauper had gained a new settlement, or the town of *Boston* must be chargeable. And he thought the facts disclosed in this case abundantly shewed a settlement gained either at *Barnstable* or *Sandwich*; and for the decision of the present case, it was entirely immaterial at which of those places the settlement was gained. He *made his home* for several years in one and the other of those places, and two years in each of them. The construction which the plaintiff's counsel put upon the statute, *viz.* that the residence to gain a settlement must be continuous, and without any interruption, or even an excursion for business or pleasure, is too narrow and inconvenient to receive the countenance of the court.

That this person's residence was not secret or clandestine while at *Barnstable* appears from his living with one of the selectmen of the town, whose office it was to warn such strangers as they wished to protect the town against. This person was then young and vigorous, and his settlement there was probably considered rather as an acquisition than a burthen. The statutes of 10 *G.* 2. *c.* 3. and 13 *G.* 2. *c.* 1. shew that the legislature contemplated that some towns might be clandestinely and unexpectedly burthened by strangers gaining a settlement, and provision is made for their indemnity by an action against those who harboured them. This indemnity is open to *Barnstable* and *Sandwich*, but *Boston* cannot claim it.

Blake, in reply, cited the case of *Rex* vs. *Walpole*(2).

The court (except the *chief justice*, who did not sit in this cause,) affirmed the judgment of the common pleas, and said

(2) 1 *W. Black. Rep.* 669.—*Burr. Sett. Cases*, 638. *S. C.*

there could be no doubt that a mariner making his home in any town for more than a year, and following the business of his profession therefrom, acquired a settlement in such town. They gave no opinion whether, upon the facts in this case, the settlement of the pauper was in *Barnstable* or *Sandwich*, but clearly it was not in *Boston*.

Abington *vs.* Boston, *in error*.

Costs for the defendants.

THE INHABITANTS OF RANDOLPH
versus
THE INHABITANTS OF BRAINTREE.

IN this action, which was pending in the county of *Norfolk*, the inhabitants of *Randolph* demanded their due proportion of money received by the defendants from the proceeds of a fishery in that part of the river *Monaniquet*, which is within the town of *Braintree*.

The town of *Randolph* has no claim to a share of the avails of the fishery in *Braintree*, of which it was formerly a part.

The action was tried the last week at *Dedham* before *Parker, J.* from whose report it appears that the plaintiffs grounded their claim on the act of the government incorporating them as a town, [1792, c. 49.] by the second section whereof it is provided "that the inhabitants of the town of "*Randolph* shall pay their proportion of all debts now due "from the town of *Braintree*, and shall be entitled to receive "their proportion of all debts and monies now due to the "said town of *Braintree*, and also their proportionable "part of all other property of said town of *Braintree*, of "what kind or description soever."

By statute of 1791, c. 36. the town of *Quincy* was incorporated, and in that act there is a provision exactly like the one above quoted. Both *Randolph* and *Quincy*, before their respective acts of incorporation, were parts of the town of *Braintree*.

To prove that, at the time of the incorporation of *Randolph*, the town of *Braintree*, in its corporate capacity, had

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a property in the fishery of the aforesaid river, the plaintiffs read copies of sundry records of said town shewing its proceedings relative to said fishery from the year 1735 to the year 1797.

From these records it appears that the town had repeatedly chosen committees to take care of the fish, to see that obstructions to their passage in the river were removed, to purchase in the claim of a Mr. *Vinton*, to determine when the mills might go, and on what days the fish might be taken, to apply to the general court for an act to prevent obstructions to the passage of fish in the river, and to settle with such persons as had transgressed in stopping the fish.

In the year 1797, the town voted to farm out the privilege for five years at 103 dollars *per annum*, and this rent was annually paid into the town treasury, except that the town relinquished their claim for the last of the five years. For the plaintiffs' proportion of this money this action was brought.

The defendants proved that the inhabitants of *Weymouth*, and of *Quincy* since its incorporation, had used the fishery as well as the inhabitants of *Braintree;* and that for several years a *Spaniard* had fished there without any interruption from the inhabitants of *Braintree* or their committee.

By consent of parties a verdict was returned for the plaintiffs, subject to the opinion of the court, whether at the time of the passing of the act for the incorporation of *Randolph*, the inhabitants of the town of *Braintree* had such a property in the fishery in said river, as that the town of *Randolph*, by virtue of the second section of that act above recited, were entitled to their proportion of said fishery, and so are entitled to recover their proportion of the avails thereof: and if the court should be of opinion with the plaintiffs, then judgment was to be rendered according to the verdict, otherwise the plaintiffs were to become nonsuit, and the defendants to recover their costs.

The cause was continued *nisi*, and at this term was argued by *B. Whitman* and *Whiting* for the plaintiffs, and *Dexter* and *Wheaton* for the defendants.

The opinion of the court (the *chief justice* excepted, who had been of counsel in the action) was afterwards delivered as follows by

SEDGWICK, J. It appears that *Randolph* was, previous to the ninth of March, 1793, part of the town of *Braintree;* that on that day it was incorporated into a distinct town; and what gives rise to the present dispute is a clause in the act of incorporation expressed in these words: "That "the inhabitants of the town of *Randolph* shall pay their "proportion of all debts now due from the town of *Brain-* "*tree;* and shall be entitled to receive their proportion of all "debts and monies now due to the town of *Braintree;* and "also their proportionable part of all other *property* of said "town of *Braintree*, of what kind or description soever."

In the year 1797, *Braintree* farmed out the fishery in that part of the river *Monaniquet*, which lies within the limits of the town, at a certain rent, which has been received and paid into the treasury. The action is brought to recover a proportion of this rent. If the fishery was "property," in the meaning of the recited clause, the plaintiffs are entitled to recover, and the verdict must stand. If not, by the agreement of the parties, the plaintiffs must become nonsuit.

It is not pretended, and indeed cannot be, that by the principles of the common law a town has a right of property in a fishery within its limits. There is no general publick statute of our own government, which confers such a right, or acknowledges that it exists. There is no private act, shewn to the court, which grants such a right to *Braintree*, or recognizes it as existing. On the contrary, the act passed in 1770, being an act additional to the act to prevent any persons obstructing the fish in their passage up into *Monaniquet* river within the town of *Braintree*, negatives, by necessary implication, the supposed right. For by the second section it declares "that the inhabitants of *Weymouth* shall "be entitled to the privilege of taking the fish in the said "river, on the banks of the same, with scoop-nets, *within* "*the township of Braintree*, as the inhabitants of *Brain-* "*tree* are entitled to." Now it is probable that this statute

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was enacted at the instance of *Braintree:* at any rate it cannot be presumed that the legislature would have violated *a right of property* known or supposed to be vested in that town, or claimed by it.

If then the right claimed by the plaintiffs cannot be supported on the principles of the common law; if it is not established by any statute, publick or private; and if in one instance, at least, the legislature has made a declaration inconsistent with it; it only remains to be enquired whether the plaintiffs have established their right by any prescription which appears in the case.

We have carefully attended to the conduct of *Braintree,* as shewn in their corporate proceedings, and we do not any where find, until after the act of incorporation, even a claim of a right of property in the fishery; and of course we perceive no evidence of the exercise of such a right. There is indeed a manifest claim of a right to prevent, and to remove obstructions, and to form regulations for the preservation of the fish, and to prevent an unnecessary destruction of them. But we no where find any claim of a corporate property in the fishery itself; nor any attempt to make it available, *as such,* to the benefit of the town. We are therefore of opinion that the verdict must be set aside, and a nonsuit entered.

Plaintiffs nonsuit.

THE SELECTMEN OF BOSTON, APPELLANTS,

versus

WARD NICHOLAS BOYLSTON.

The probate court, in adjusting the account of an executor or administrator, is competent, having satisfactory evidence before it, to require an allowance of assets not inventoried or credited.

It is doubtful whether the provision in *stat.* 1783, *c.* 32. § 12. extends to executors and administrators. If it does, it extends only to an examination for the purpose of discovery.

When an executor or administrator refuses to return an inventory, or being summoned, and in answer to interrogatories, denies that any personal estate of the deceased has come to his hands, the only remedy, for those claiming benefit from the estate, is by action at law on the bond of the executor or administrator.

AFTER the former decision in this cause(1), that the respondent was not held to account here for the effects received by him, as administrator of *Thomas Boylston,* in

(1) *Ante vol.* 2. 384.

England, the proceedings were continued at the motion of the appellants, upon a suggestion that certain documents were necessary to be obtained from *England*, in order to shew that the respondent was accountable, in his said capacity of administrator, for a large sum of money he had recovered, by a judgment of this court of the estate of the late *Moses Gill*, Esq.

And at this term, the expected documents having been received, the counsel for the appellants opened their evidence, and argued at considerable length that the respondent was chargeable, and that it was competent for the court, under this form of proceeding, to ascertain, from the respondent's answers to the interrogatories, and from the evidence adduced by the appellants, the amount of assets with which the respondent should be charged.

The court, after some little conference on the bench, suggested a doubt, whether the appellants had not misconceived their remedy, and whether it was competent upon this particular process to go out of the respondent's answers to the interrogatories: and intimated an opinion that the most proper and regular remedy would be upon the respondent's administration bond.

The counsel for the appellants insisted that before a suit could be brought on the bond of an administrator, in behalf of an heir for his part of the personal estate, of a deceased intestate, there must first be a decree of the probate court ascertaining its *quantum*(2). By the statute similar proceedings are to be had on bonds of executors, &c. Then when a suit is commenced in behalf of a residuary legatee, it is equally required that the amount of the residue be first ascertained by a decree of the probate court. The object of the present proceedings is to obtain such a decree. After that object is obtained, and it is apprehended not before, the way will be open for the legatees to cause a suit to be commenced on the bond.

If such a previous decree be necessary, it must follow that the probate court has authority to make it, and has all the powers necessary to enable it to make it correctly. In this must be included the power of examining the adminis-

(2) *Stat.* 1786. *c.* 54.

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trator upon oath, and also of receiving and weighing all other testimony, which has any bearing on the subject. It is true that it has been held in *England* that the spiritual courts have not authority to decide on an inventory (3), but must receive it as exhibited by the administrator: but the powers of probate courts here are much more extensive than those of the spiritual courts in *England*, as might be abundantly shewn from the various statutes conferring jurisdiction upon them, and relating thereto.

The counsel for the respondent observed that at common law no action lies for a legacy, the only remedy being by bill in chancery, praying that the executor may be held to disclose assets, &c. As we have here no court of chancery, our statute has given a remedy, by suing the probate bonds, for that case, and for every other case, which in *England* is obtained only by suit in chancery. In a suit upon the bond, an administrator has a right to say that he has received no property belonging to the estate committed to his administration, and to ascertain this he is entitled to a trial at law, and is not bound to submit to a decree of the probate court.

All that the probate court can do, is to cite the party to render an inventory or account. If he comes in voluntarily, and renders a satisfactory inventory or account, it is well: but if he will not come in, or, having come in, will not satisfy the probate court, the jurisdiction of this latter in the case is at an end. It will record his neglect or refusal, and furnish the injured party with the means to pursue him upon his bond. This mode of proceeding gives every party, supposing himself aggrieved, an abundant remedy, and at the same time leaves the administrator a common law trial of the question whether he is answerable for effects, and to what amount.

For the appellants in reply. The statutes of the commonwealth have given to the courts of probate the sole power to distribute the residue of the estate of one deceased, after debts and legacies paid, among the next of kin, entitled to such residue. But it is perfectly absurd to speak of such a power, if they have not also the power to ascertain the amount of such

(3) 3 *Burr.* 1922.

residue. And until the amount is so ascertained, no suit can be maintained on the bond, in favour of the next of kin, for their distributive shares. So neither can a residuary legatee, who is *hæres factus*, maintain an action on the bond, until by an inventory and account, passed in the probate court, the amount of his legacy shall have been ascertained. Nor can he have his action at law for the legacy, which is given him by statute of 1783, c. 24. until he is able to shew the amount of that which he demands. And if the probate court will not or cannot ascertain the balance remaining after debts and legacies paid, this useful statutory provision is of no force.

The court took time for consideration, and their opinion (excepting that of the *chief justice*) was afterwards delivered by

SEWALL, J. *Ward Nicholas Boylston*, administrator *de bonis non* with the will annexed of *Thomas Boylston*, late of *London* deceased, appointed by letters granted in the county of *Suffolk*, having been cited into the probate court for that county, has been, in that court, and also in this court upon the appeal, examined by certain interrogatories; to which he has answered, that no effects or credits of the testator have come to his hands, since letters of administration were granted to him; excepting such as he claims to hold as his own property, by virtue of legal transfers and conveyances of the same from the said *Thomas Boylston* long before his decease; referring to them specially, and making them parts of his answers, and stating in particular the receipts, which he claims to hold under them as his own property. The appellants contest, in a general view, the validity and effect of the transfers and conveyances exhibited and relied on by the respondent. And further they propose to controul this evidence by other testimony and proofs; from which they would infer a legal fraud, to avoid the claim and title of the respondent.

This proposed trial, involving as well matters of fact as of law, has given rise to a question, which we have heard fully discussed, and are now prepared to decide, how far the probate court is competent, and will in this case exercise its ju-

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risdiction, in charging the administrator with assets not admitted by him?

And upon consideration we are all of the opinion that the probate court in adjusting an account exhibited by an executor or administrator, are competent, having satisfactory evidence before them, to require an allowance of assets not inventoried or credited(4). This authority, if it is an extension of the authority of the ecclesiastical court, seems to arise, in the probate court, out of the necessity of the case. But in the exercise of this authority it appears to us that the probate court, when the question is of magnitude, and depending upon an investigation of facts as well as law, ought to employ its discretion in rejecting or suspending the account, that the parties may have their remedy at law.

According to this opinion, the court, if in the case at bar they were proceeding upon an account rendered, might refuse in its discretion, to enter upon the proposed trial, or to decree that the respondent, for the effects received by him, or any part of them, was or was not accountable. And the result of the examination of an account rendered, when it had proceeded so far, would be an assignment of the bond of administration, at the prayer of the party interested, to enable them to proceed in a trial at law.

But the case at bar is presented to us under a very different aspect from that of an account rendered by an administrator.

The process, in which this question arises, has been stated by the appellants, to be grounded on the provision of the statute, [1783, c. 32. § 12.] which authorizes the probate court to convene before them, and examine upon oath, any person suspected of embezzling, conveying away, &c. the goods, effects, &c. of a deceased person. It is at least questionable, in the opinion of the court, whether an executor or administrator can be, under any circumstances, liable to an examination pursuant to that provision of the statute. But if he is, it is very clear that the authority of the court, under that provision, extends only to an examination for the purpose of discovery. No other power is given by the statute; and in that extent it is analogous to the power exercised by

(4) *Com. Dig. Title Administration, C. 3.*

the court of chancery in *England* upon a bill for discovery. The examination is not to be controulled by other evidence. No relief can be granted upon it: the remedy being employed to enable the complainant to bring an action at law, or to furnish evidence in a suit pending(5).

There is however another, and more correct view, in which the case at bar may be considered. It is the duty of an executor or administrator to render an inventory, upon oath, of whatever effects of the deceased testator or intestate have come to his hands. He may be cited to render this inventory; or in other words, to account. And according to a provision of the statute for regulating proceedings upon probate bonds in the courts of common law, when the administrator shall refuse or neglect to account upon oath, for such property of the intestate as he may have received, especially if he has been cited by the probate court for that purpose, execution (that is, after judgment recovered upon the probate bond) shall be awarded against him for the full value of the personal property of the deceased, that has come to his hands, without any discount or allowance, &c. And when it shall appear that the administrator has received the personal property of his intestate, and shall not have exhibited, upon oath, a particular inventory thereof, execution shall be awarded, after a like judgment upon the bond, for the whole penalty of such administration bond, to be distributed among the parties interested, agreeably to the directions of law.

In the case at bar, the administrator has been cited to account. His answers to the interrogatories, to which he has submitted himself, are in effect a refusal to render an inventory, a refusal to account: and he avers that no personal property of the testator has come to his hands. To decide upon the facts submitted, or upon the further proofs to be adduced, in this summary mode of trial, if conclusive upon the parties, would deprive them of the advantages of a trial upon more formal proceedings, and before a jury, to determine any facts contested between them: and if not conclusive, this summary trial exposes them to fruitless vexation and expense.

(5) *Com. Dig. Title Chancery, 3, B.* 1, 2

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A court of chancery would, I apprehend, send a question of this kind for trial to a court of law. This court has no power to do this in a direct manner in this case. But their power to execute any decrees they may make in the case is confined to the penalty of the probate bond: and the statute, having directed the course of proceeding in a suit thereon, and the judgment to which the party becomes liable, if the complaint should bemaintained, is to be construed, we think, if not as determining exclusively, yet as unquestionably opening the remedy to which the parties may resort, where an administrator being cited has refused to account, or has neglected to render an inventory, having in his hands personal property of the testator or intestate.

It is impossible to construe the statute as requiring, in a case of this kind, of the party at whose promotion an action is to be brought upon the probate bond, the particular evidence there directed, and made essential in certain instances, to the end that an execution, when a judgment is recovered upon the bond, may not *always* be issued in the name of the judge of probate; but in those instances, in the name of the party, for whose particular use and benefit the money, for which execution issues, is to enure.

The bond is a lawful bond, made to the judge of probate, as the trustee of all parties concerned; and his right of action, although to be exercised at his discretion, or under the judicial direction of the probate court, except in the instances specially provided for by the statute, is not taken away by any negative words or necessary implication.

The administration granted to the respondent, with the will annexed of *Thomas Boylston*, is to be considered, not only as a means of collecting the effects of the testator within this jurisdiction, but of answering, according to the rules of the same jurisdiction, the demands of creditors, and all legal liens upon those effects. By the will, under which the administrator is acting, it appears that the appellants are residuary legatees. They have therefore a direct and immediate interest in the account of the administrator, and in every process, which can be instituted, to determine the amount of the effects collected, and the charges to which they are

justly liable; or, in other words, in ascertaining the *residuum* of *Thomas Boylston's* effects within this jurisdiction.

Upon the whole, we are all of the opinion, that the parties in this controversy ought to be referred to a trial at law. And that this may proceed free of any embarrassment from a previous decree, we shall, if no further cause be shewn to the contrary, reverse the decree, given as we understand *pro formâ* by the judge of probate for the county of *Suffolk:* and we shall decree that at the promotion of the appellants, they shall have authority to proceed, in the name of the judge of probate, but at their own risk and expense, in an action at law upon the probate bond of the respondent.

The following decree was afterwards made.

"*All which being seen and considered, and by the court* "*here fully understood, it is thereupon* ordered *and* decreed "*as follows, that is to say,*

"First. *That at the promotion of the inhabitants of the* "*town of* Boston, *claiming to be interested as residuary* "*legatees of the said* Thomas Boylston *deceased, if they see* "*cause, the judge of probate for the county of* Suffolk *shall* "*and may authorize the said inhabitants to commence and* "*prosecute, in the name of the said judge of probate, but* "*at their risk and expense, in which he shall be fully in* "*demnified, an action at law upon the probate bond of the* "*said* Ward Nicholas Boylston, *and to proceed therein to* "*final judgment, to the end that it may be determined in a* "*trial at law, whether the said* Ward Nicholas Boylston, "*administrator as aforesaid, had or hath in his hands any* "*goods, effects or credits, or other personal property of the* "*said deceased, of which he has neglected or refused to ren-* "*der a sufficient inventory or account, as the law requires.*

"Secondly. *That the decree of the said judge of probate,* "*interposed in the premises, and appealed from as afore-* "*said, be, and the same is hereby reversed: and all and* "*singular the proceedings aforesaid are to be remitted to* "*the said judge of probate, with this decree, that he may* "*proceed therein according to law.*"

Morton and ***Dexter*** for the appellants.

Otis and ***Jackson*** for the respondent.

JOHN HEARD, ASSIGNEE OF FREDERICK W. GEYER & SON,
versus
GAMALIEL BRADFORD.

Money paid pursuant to the award of the commissioners under the treaty of 1794, between the *United States* and *Great-Britain*, was to be paid over according to the interests of the concerned: and where a sum was awarded nominally to one, the interest of which was in another, that other is entitled to the benefit intended, and may recover the money in an action for money had and received.

THIS was an action of *assumpsit* for money had and received, and upon trial before *Parker, J.* a verdict was taken for the plaintiff subject to the opinion of the whole court, upon a report of the case by the judge, who sat on the trial.

From that report it appeared that on the 26th of November, 1793, the defendant chartered his brigantine *Jerusha* to *F. W. Geyer & Son*, for a voyage from *Boston* to the *West-Indies*, and back to *Boston*, or from the *West-Indies* to any port or ports of *Europe* (the straights excepted) and back to *Boston*, where she was to be discharged, dangers of the seas excepted. In consideration of which *Geyer & Son* agreed to pay in full for the hire of said brigantine, 100*l.* lawful money per month, so long as she should be continued in the aforesaid service, in thirty days after her return to *Boston*, and they were to pay light money and other port charges during said voyage, and to deliver said brigantine on her return to *Boston* to the owner or his order. The brigantine was loaded and sailed December 5th 1793, for *Guadaloupe*, where she arrived on the 27th of the same month, and was discharged of her cargo on the 8th of January, 1794. Part of the outward cargo having been sold, and part of another cargo laden on board for *Hamburg*, on the 12th of April, 1794, the vessel, and what cargo was on board, were taken by the *British* fleet under Admiral *Jarvis*. The defendant demanded of *Geyer & Son*, and in January, 1795, they paid to him the hire until the capture, which for four months and an half, the time she had been in the service of the charterers, amounted to 1500 dollars.

Before the commissioners in *England*, sitting under the treaty of *London*, the said *Bradford's* agent claimed compensation for his brigantine and freight, according to the charter-party; and *Geyer & Son* claimed for the cargo. Both claims were allowed, *viz.* to *Bradford* 4000 dollars for

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his vessel, and 1500 dollars for the freight; and to *Geyer & Son* the value of her cargo or board at the time of the capture, with interest on the several allowances, through the instalments. But said *Geyer & Son* lost a great part of their said cargo, which was on shore, by means of the capture of the said island, for which no allowance was made by the commissioners. The compensation for the freight was claimed by the agent of *Bradford* without his knowledge, he apprehending that he had only claimed for his vessel.

This action was brought to recover the money received by *Bradford* on the first payment or instalment of the award of said commissioners made for the freight aforesaid, for which sum and interest the verdict was rendered.

The judge instructed the jury that *Bradford*, in consequence of the above capture, had a just claim on the *British* government under said commission for the freight of his vessel due to him at the time of capture, according to the charterparty; and that it was probable that he and said *Geyer & Son* conceived that they the said *Geyer & Son* were also liable under the charterparty to pay for the same, and that under that idea they accordingly paid it; that *Bradford's* claim on the commissioners had probably gone forward prior to his receiving the money from *Geyer & Son*; that when *Bradford* had obtained the money under the commission, he must be considered as having received it to the use of *Geyer & Son*.

It appeared on the trial to be the rule of the commissioners to estimate the nett value of the cargo at the port of destination, meaning the value there after deducting the freight, and it was agreed that *Geyer & Son's* cargo was so settled.

The judge observed further that it was presumable that the commissioners considered parties and claims as they stood at the time of capture; at which period the defendant had a right to claim for his own use, but afterwards on payment by *Geyer & Son*, he must be considered as maintaining his claim in trust for them.

There was also a letter from *Bradford* dated October 7th 1803, in these words. "Mr. *F. W. Geyer*, I have just re- "ceived letters from Mr. *Williams* in *London*, stating the "amount of award decreed me in the case of the *Jerusha*.

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"with permission to draw on him for the first instalment; "but as there is nothing in the statement respecting freight, "and I never having claimed any thing of that kind, I pre- "sume the award is only for the vessel. I am sir," &c.

Upon the whole the judge gave his opinion to the jury in favour of the plaintiff. The defendant now moved for a new trial on the ground of misdirection.

In support of the motion it was contended that this money, althought it might be paid to the defendant by a mistake on the part of the *British* government, could not be considered as received for the use of *Geyer & Son*, but of the *British* government. The money paid by *Geyer & Son* to *Bradford* was legally due pursuant to the stipulations of the charterparty. If they now receive this money, they will have had their goods transported in the defendant's vessel free of any expense, which has certainly never been contemplated by any of the parties.

For the plaintiff, it was urged, that *Geyer & Son* were not legally held to pay the hire to *Bradford*, the voyage not having been performed, which was the stipulated condition on which it was to become due(1). But to suppose it otherwise, there can be no pretence for the defendant to receive and hold twice the amount of his charter. If the defendant had received the compensation from *Great-Britain* immediately upon the capture, could he afterwards have maintained a legal demand against *Geyer & Son* for the money? certainly not. What pretence then has he to hold the money thus paid?

The opinion of the court (*the chief justice* excepted, who had been of counsel in the cause) was afterwards thus delivered by

SEDGWICK, J. [After particularly stating the facts.] Whether the defendant was, or was not entitled to freight for the hire of his vessel, antecedent to the capture, is of no importance in deciding this case. He certainly was not entitled to both the sums, which he has received. He cannot be authorized to retain it from the plaintiff, for the reason alleged, that he is responsible for it to the *British* government. The award of the commissioners was in pursuance of a national

(1) *Abbot on Shipping*, 208.

convention between the *United States* and *Great-Britain*, to compensate for illegal captures. Such an award must be decisive, from the nature of the subject, against any claim, which the government of *Great-Britain* can set up to recover the money out of the hands of the defendant. The right of the defendant to retain the money, founded on the supposition that it belongs to the government of *Great-Britain*, and may be recovered against him, is wholly groundless. Nothing can be more fanciful than the doctrine that the awards of the commissioners are revisable by courts of law, and that wherever they were made on a mistake of the merits of the claimant, the king of *Great-Britain* can maintain *indebitatus assumpsit* for money received to his use: and I may add that nothing could be more mischievous than an attempt of courts of justice to carry such a doctrine into effect. We are then bound to say that the award in favour of the defendant is a valid act, authorizing him to receive the money. The only remaining question is, to whose use the money was received.

Keeping it in mind that the award conclusively decides that Mr. *Bradford* was entitled to receive, and the *British* government bound to pay this money, the question of his right to retain it against the plaintiff is, in my opinion, of easy solution.

Previous to the award the defendant had received of the bankrupts, whose assignee the plaintiff is, the identical sum awarded, and for precisely the same subject. Now I cannot distinguish this from a common case, which may be supposed——A. pays to B. the debt of C. which is afterwards demanded and received by B. of C. Equity and good conscience manifestly require that it should be paid over to A. to whom in justice it is due. C. has no claim to it, for he has only paid what he owed. B. cannot retain it, for he has been twice paid all that was due to him: and by paying it to A. all the parties have good justice and no more.

In this case, *Bradford* having ratified the act of his agent, in claiming the freight, by receiving the money, cannot be permitted to say that it was not received for a just debt: and as the money so received had been previously paid by Mess.

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Geyer & Son, it must be considered as received by the defendant to their use.

It is believed that, in all cases, the awards of commissioners must be conclusive against the government of *Great-Britain*, and that, as they relate to the interests respectively of those who are to derive a benefit from them, those interests must depend on the existing state of facts. The awards operated on the subjects themselves, and conveyed an interest, as a relation to those subjects might determine. In many instances the commissioners did not know, and could not know, the interests of those, who ought to receive the money awarded, either for the vessel, the cargo or the freight: as must frequently happen in cases of insurer and insured, and in other cases. We all think therefore that the rights of the parties must depend upon their interests; and that whenever an award was made *nominally* to one, where the interest was in another, that other would be entitled to the benefit intended: and that, according to this principle, the money, which in this case was awarded, was for the benefit of Mess. *Geyer & Son*, and ought to be paid over to them.

We therefore think that the direction of the judge was right, and that the verdict ought to stand.

Judgment according to the verdict.

AMASA STETSON

versus

THE MASSACHUSETTS MUTUAL FIRE INSURANCE COMPANY.

Where a moiety of a building insured by the *Massachusetts Mutual Fire Insurance Company* was conveyed in fee, the grantor reserving a term of seven years therein: and the grantee immediately reconveyed the same to the grantor in mortgage; and the mortgagee demised them to the mortgagor and another for seven years reserving rent; it was held that the company was liable in case of a loss notwithstanding such conveyances.

Where a building insured by the same company, was represented, at the time of effecting the insurance, as connected with another building on one side only, and before the loss happened it became connected on two sides, the policy is not avoided, unless the risk thereby became greater.

COVENANT broken upon a policy of insurance upon the plaintiff's dwelling house, alleging that it was consumed by fire in December, 1801.

The defendants pleaded three several pleas in bar, upon the replication to the first of which issue was joined and a verdict found for the plaintiff.

In their second plea the defendants acknowledge the making the policy as declared on, and the destruction of the house by fire without design in the insured, in the manner alleged by the plaintiff: but they further say that after making the policy, and before the fire took place, *viz.* on the 11th of December, 1800, the plaintiff conveyed one half in value of the said house to one *Thomas Harris*, to hold the same in fee simple, saving the term of seven years, which the plaintiff reserved therein, which said term he on the 12th of the same December, assigned to the said *Harris* and one *Lewis Gorham*, so that the plaintiff, at the time the said house was consumed, was not the owner thereof according to the form and effect of the policy, and of the rules of said company. And afterwards, *viz.* on the 12th of January, 1802, certain trustees of said company, according to the rules thereof, taking the premises into consideration, and being well advised thereof, declared the said policy to be null and void, and the said policy thereby, according to the rules of the company, became void, the said declaration of said trustees having been duly made and accepted.

To this plea the plaintiff replies, and confessing the making of the deed to *Harris*, alleges that at the time of making the same, the said *Harris* conveyed the same estate to the plaintiff by mortgage, conditioned for the payment of a certain sum of money, which the plaintiff avers was not paid pursuant to the said condition, nor at any other time. The plaintiff then sets forth a lease from him to *Harris* and *Gorham*, of the estate described in the plaintiff's conveyance to *Harris*, for the term of seven years from the 12th of December 1800, reserving a rent to be paid quarterly, with a right of re-entry in case of non-payment of the rent.

To this replication the defendants demur generally, and the plaintiff joins in demurrer.

In their *third* plea the defendants allege that before the making of the policy declared on, the plaintiff in his proposal for insuring his house, described it, in its relative situation

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as to other buildings, as connected on one side only, and declared that it was in fact so situated, and in consequence thereof the premium was agreed upon, and the policy was made; but afterwards, on the 20th of the same December, a certain framed building was erected on ground adjoining the said house belonging to the plaintiff, and was joined to the said house, so that the same house thereby became connected in relation to other buildings on two of its sides, and the risk of fire to the same was thereby rendered greater: and that at the time of the fire aforesaid, the said framed building was burnt with the house. The plea then sets forth the declaration of the trustees that the policy was void in the same terms as in the second plea.

To this plea the plaintiff replies that after the policy was made, and before the premises were destroyed by fire, they were not repaired, or enlarged, or altered, *in such a manner as to render the risk of their being consumed by fire greater.*

The defendants demurred to this replication, and the plaintiff joined in demurrer.

[The following articles of the company are referred to by the counsel or the court, *viz.*

Art. 6. The trustess shall have power—to declare any policy null and void, in all cases where the insured shall have repaired or enlarged a building, or have appropriated the same to other purposes than those mentioned in the policy, thereby rendering the risk greater; unless the assured will add to his premium, and deposit such a sum, as shall be deemed by them to be an equivalent.

Art. 7. The president and directors shall appoint one or more agents in such towns within the commonwealth, as to them may seem proper. They shall have power, and it shall be their duty—to value any building—to describe the materials of which it may be built, the use to which it is applied, and its situation, as it respects other buildings. They shall estimate its rate of hazard, and certify the same in writing, &c.

Art. 8. No alteration in terms of insurance shall be made, on account of a building's being made more or less hazardous, by means not under the controul of the insured.

Art. 18. When a building insured shall be aliented by death, sale, or any other means, the insured, his, her, or their representatives, may surrender his, her, or their policy or policies, and receive a sum not exceeding their deposit money.

Art. 23. No transfer of a policy shall operate to discharge the person insured from his obligation to fulfil the conditions of said policy, until said transfer be entered in the books of said company.]

The cause was argued at the last March term in this county by *G. Blake* for the plaintiff, and *Amory* for the defendants.

Amory in support of the demurrers observed that the pleadings exhibited the whole of the case, and he should therefore consider it upon its merits as if it was before the court upon an agreed statement of the facts.

Two points arise in the defence of the action, both going in the apprehension of the defendants to render the contract no longer binding, and in effect a mere nulity, *viz.* 1. The alienation of the property by the insured. 2. An alteration in its relative situation respecting other buildings, and that by means under the controul of the asssured.

As to the alienation of the property, it is to be observed, that by the act of incorporation, and indeed by the very nature of a mutual insurance, the members of the company must be owners of buildings. It is in virtue only of those buildings being insured, that the owners are or can be members of the company. The plaintiff, when he affected this insurance had the requisite qualification. He was owner of the house insured. But he afterwards alienated a moiety of it. The estate then became less *his*. He had less controul of it, and less interest in preserving it. From an estate in fee, he converted it into a mere chattel interest, over which he retained no power, except in a case not to be presumed, *viz.* that the mortgagor would not fulfil his contract. Indeed for a time his estate in that part of the property was wholly out of him. This we contend, annulled the policy. His after interest in the property was not the interest contemplated by the parties when the insurance was effected. It was no more than a right to demand the stipulated rent.

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But if this alienation did not vacate the contract, we contend that the alteration made in the property must have that effect. In marine risks, when a deviation is shewn, it is never made a question whether the hazard was increased by it. The policy is avoided because the risk is not the same. By analogy to this rule, it is not material in the present case whether the risk was increased by the alteration or not.

But we contend that the alteration here did materially vary the degree of risk: as to this contract, which was bottomed upon the description, part of which was that the building was connected with another on one side only, it was a material alteration. When the loss happened, the property insured was in a different situation from that in which it was, when the insurance was made.

If it be said that this alteration was effected by means out of the controul of the insured, we answer that from the whole case the contrary appears. The words are not technical; we must therefore seek for their import in the common sense of mankind. It appears by the first plea that the new building was erected by the plaintiff's lessees. But they derived all their authority and power from the lease made to them by the plaintiff. That lease was in effect a license to *Harris* and *Gorham* to erect the new building contiguous to that insured. It will certainly be agreed that without some act of the plaintiff, these persons could never have erected it but as trespassers. The law will give a strict construction to contracts like this which furnish so strong a temptation to fraud and imposition.

Blake, for the plaintiff, said he had no objection to consider the subject at large upon the merits, although he thought the defendants had committed the first essential fault in the pleadings. And as to the first point made on the other side relative to the alienation, he agreed that to entitle the plaintiff to recover, he must shew an insurable interest at the time of making the insurance, and also at the time of the loss.

As he had at the time of effecting the policy an undoubted interest, if he has since conveyed part of the property, he would still be entitled to recover *pro ratâ*. But we contend

that he has been constantly owner of the whole property. He did convey a part of it to *Harris*, but immediately took it back by a mortgage in fee, by which the whole legal estate was in him; defeazible indeed by an after contingency, but never defeated, as the pleadings shew.

If the same construction is to be applied to this policy as to a policy on a marine risk, the plaintiff is well entitled to recover. Suppose a ship worth 4000 dollars, and the owner effects 2000 dollars insurance. The ship is lost. In an action to recover for the loss, the underwriter shews that since the insurance was made, the assured had sold a moiety of the ship. Still he had property enough remaining in the subject of the insurance to cover the whole policy, and on that ground he would recover.

The second objection to the plaintiff's recovery arises from the alterations made in the situation of the building insured. If it even appeared that the hazard of fire was increased by this alteration, we contend that the policy is not thereby avoided, because the alteration was effected by means not under the plaintiff's controul. He was not in possession, nor had he any right of entry, except for condition broken. *Harris* and *Gorham* had the possession, and the right of pessession, and the alteration was made by them, and is precisely within the letter and spirit of the 8th article.

What is there in the contract, which prohibits an alteration in the building insured, unless the identity of the subject described is taken away, or the degree of hazard increased? Neither of those effects, it is contended, appear in this case. But if it is otherwise, still the policy does not become *ipso facto* void. It remains with the trustees, in the exercise of a sound discretion, to declare it void. But this declaration must be made while the risk continues, and the subject of the insurance remains. The absurdity of a party's retaining a power to annul a contract, after the case for which it provided has happened, and the claim of the other party has become fixed and absolute, is too apparent to require a serious discussion.

The action stood continued for advisement until this term, when the following opinion was delivered by

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SEWALL, J. The *first* objection made for the defendants is, that the plaintiff, at the time of the loss had no interest in the building originally insured to him by the policy in the case.

The facts admitted by the pleadings are, that after the issuing of the policy, the plaintiff sold and conveyed to *Thomas Harris* a part of the building insured, reserving a term of seven years in the premises; and that *Harris* at the same time reconveyed them to the plaintiff, in mortgage, to secure the purchase money. And it appears that the occupants, at the time the building was burnt, held under a lease from the plaintiff, upon a rent payable to him quarterly.

The sale and contracts between the plaintiff and *Harris* affecting a part only of the premises insured, it is a question for the jury to determine, what interest the plaintiff retained, and the value of it. It may be further observed that a sale and reconveyance by mortgage to secure the purchase money, executed at one time, are, for many purposes, to be regarded as one instrument. And taking all the writings together, the actual sale of the property insured, as to the moiety affected by these contracts, was substantially, and in answering a question of the interest of the plaintiff, to be considered as a conditional sale after the expiration of seven years. This objection does not arise upon the terms of the contract. The 18th article, especially if we connect with it the 23d article, imports a continuance of the contract, notwithstanding an alienation of the premises insured. It seems to have been the intent of the parties, that in this mutual insurance, although the insured is at liberty, upon an alienation, to surrender his policy, or to transfer it: yet that his deposit and personal responsibility are retained by the company until a surrender, or an acceptance of the assignee by an entry in the transfer books of the company.

But however this may be, the objection, if the facts had warranted it, must upon general principles prevail. It is a maxim of public policy, important to good morals, and for the prevention of frauds in contracts of this nature, that gaming insurances, insurances without interest, are unlawful and of no validity. It is incumbent, therefore, upon the party

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claiming a loss upon a policy of insurance, to shew an interest in the subject of it, and in the event insured against; and his demand must appear to be for an indemnity, and not for a wager, become successful, as in this instance, by a public calamity. An objection of this kind is not supported by shewing contracts affecting the formal title of the plaintiff, in a part only of the subject of the insurance. His interest in a part remains the same; and perhaps substantially, and for the purpose of repelling this objection, is to be considered as unaltered in the whole of the premises insured.

Upon the whole, it is the opinion of a majority of the court, that the replication to the second plea in bar is sufficient in law.

The *second* objection is, that certain alterations, in reference to the representation of the state of the building insured when the policy was effected, had been made by the party insured, whereby his policy was vacated, and the defendants were discharged from this insurance, before the loss happened.

This objection may be examined upon general principles, and upon the terms of the contract.

The estimate of the risk undertaken by an insurer must generally defend upon the description of it made by the insured or his agent(1). A mistake or omission, in his representation of the risk, whether wilful or accidental, if material to the risk insured, avoids the contract(2). And where the estimate of the risk depends upon the continuance of the material circumstances represented to the insurer, these are not to be altered to his detriment, by any act of the insured, without a like effect upon the contract.

But to what degree is the insured restrained in this respect? If every, the least, alteration or enlargement of a building insured against fire, is necessarily and of course material to the risk, and whenever it is made by the act or consent of the insured, is to vacate the policy, unless it should be renewed by the insurer; so close a restraint upon the party would place

(1) *Marshall*, 335.
(2) *Ibid.* 339.

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contracts of this kind in a state of complete uncertainty; and would render them so inconvenient, as wholly to prevent them.

This degree of restraint will not be contended for. But in the argument for the defendants, it has been contended that the enlargement of a building, represented to be contiguous to other buildings on *one* side only, to the effect of making it contiguous on *two* sides, is under all possible circumstances, a material alteration, which ought to discharge the policy: and that it is to be considered in the light of a departure from the voyage described, in a marine insurance, and must have a similar effect upon a policy to insure against fire.

The true reason why, in a case of marine insurance, a deviation discharges the insurer, is not the increase of the risk; but that the party contracting has voluntarily substituted another voyage, for that which was insured (3). This change of the voyage determines the contract from the time it happens. The same strictness is not requisite in an insurance against fire, where the building, althouth enlarged or repaired, remains the same: and it is only necessary to guard the insurer from an *increase* of his risk, by an alteration of the building insured. And if an alteration of the kind alleged in this case may be made, under any circumstances, without increasing the risk of the insurer, there can be no reason, upon general principles, that it should determine the policy. Suppose, for instance, the subject of the insurance to be a wooden building, separated at the distance of a few feet from a brick wall in another building, and to be enlarged and made contiguous to the brick wall; it is obvious that such an alteration may diminish, and not increase the risk. And if this may be reasonably supposed in any case, then whether the enlargement of a building insured has increased the risk of the insurer, is a question of fact, to be determined by the jury.

The parties to this contract appear to have been aware of the inconvenience, which a minute restraint in this respect would produce to be insured; and the effect upon the policy from alterations in the building insured, has not been left as a question of construction upon general principles; but

(3) *Marshall*, 394. 186. *Lavabre* vs. *Wilson*.

has been regulated by express stipulations in the contract, which must determine the law between the parties.

The value, materials, and uses of any building proposed to be insured, and its situation relative to other buildings, and the consequent estimation of the rate of hazard, are understood to be represented by agents appointed for the purpose, who are to state and certify these circumstances to the trustees of the company, by whom, and at whose discretion the policy is to be issued [*Article 7.*] By the preceding article the trustees are authorised to annul a policy, whenever the insured shall repair or enlarge his building, or appropriate it to other purposes than those mentioned in the policy, "*thereby rendering the risk greater*," unless the insured will add to his premium an equivalent in the estimation of the trustees. By a subsequent article, this power of the trustees is not to extend to any case where a building "*becomes more or less hazardous*" by means not under the controul of the insured.

By these stipulations we discover what, in the intentions of the parties to this contract, was to be estimated a material alteration from the representation given of the building insured. Whether the alteration is by repairs, by enlargement, or by a new appropriation of the building; it must in fact *render the risk greater*, the building must *become thereby more hazardous*, or it is not material, and is not allowed to affect the contract.

The averment therefore in the plea of the defendants in the case at bar, that by the enlargement of the building insured the risk had been increased, is material, and must be maintained, or their plea is insufficient. The traverse of that averment is confessed by the demurrer, and the replication must be adjudged sufficient.

And it is the opinion of a majority of the court, that the replication to the third plea in bar is good and sufficient in law.

PARKER, J. concurred.

PARSONS, C. J. had been of counsel in the cause and gave no opinion.

SEWALL, J. then observed that the judges *Sedgwick* and *Thatcher*, who were not at this time present in court, did not perfectly concur in the opinion which had been de-

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livered but had finally consented that judgment should be rendered by the two justices who had concurred, in their absence, and this the rather as the judgment is open to a writ of error.*

* The reporter has been favoured by his honour judge *Sedgwick* with the following note of the grounds of his opinion.

When the plaintiff applied to the defendants to insure the property for the destruction of which this action is brought, the representation which he made, and which was required by the rules of the company, was doubtless intended to enable them to contract understandingly, and on equal terms with the plaintiff. By that representation it appears, and so was the fact, that the insured premises were, at that time, connected with other buildings on one side only. Had they been so connected in other parts, no reasoning is necessary to shew that danger from fire would have been thereby increased, and that therefore a higher premium would have been demanded for the insurance. Independent then of any express stipulation, if by any future event, authorized or permitted by the insured, there was a material alteration in the state of the insured property, whereby the danger of destruction by fire was increased; it is dictated by reason and justice that the defendants should thereby be discharged.

But in this case it is not necessary to rest on the reason of the thing. The meaning is rendered very apparent by what is explicitly declared. For it being stipulated in the 8th article of the rules and articles of the company, that "no alterations in terms of insurance shall be made on account of a "building's being made more or less hazardous by means "not under the controul of the insured," it is rendered certain, without referring to other articles, by which the same is implied, that *the terms of insurance shall be altered, whenever a building is rendered more hazardous by means under the controul of the insured:* or in other words, that the contract shall not, without such alteration, be binding on the insurers.

There can then be but two questions, that I can perceive, to decide this cause. 1. Was this building, by an alteration,

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An endorser of a bill of exchange is entitled to notice of the bill's being dishonoured, notwithstanding the insolvency and absconding of the drawer.

CASE on a bill of exchange by the endorsee against the endorser. Upon trial at November term, 1806, in this county, before *Parker*, *J.* a verdict was found for the plaintiff for the amount of the bill, damages and interest; to be set aside, and a new trial granted, if the court should be of opinion, upon the facts in the case, or they should be reported by the judge, that the plaintiff was not entitled to recover.

Those facts were as follows. On the 20th of February, 1804, *Samuel Ham*, of *Portsmouth*, in the state of *New-Hampshire*, drew his bill of exchange for 500*l.* sterling on Mess. *Thomas Dickason & Co.* in *London*, payable to the

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rendered *more hazardous* after the contract? And if so, 2. Was that alteration made by means under the controul of the insured?

1. As to the first question, at the time of the insurance the property insured was connected on one side only with other buildings; and it is agreed that afterwards, and before the fire, alterations were made, "by means of which the insured "building became connected on two sides with other build-"ings, whereas at the time the policy was effected, the said "building was connected with others on one side only." Did this increase the hazard? To my mind no reasoning can render more clear the proposition, *that in a populous town a building connected with others on two sides is more exposed to fire than if connected on one side only.* It is then, as I conceive, most certain that, after the policy was made, the hazard of destruction by fire was increased.

2. Was this increase of hazard by means under the controul of the insured? By the state of facts existing at the time of the contract, this must be determined, unless an alteration takes place by means, which the insured could not have controuled. In this case the land, on which the building connecting the insured building after the contract with other buildings, was at the time of effecting the policy the prop-

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defendant or his order at sixty days sight. The defendant endorsed the bill to the plaintiff, who sent it to his correspondents, Mess. *Cotterells*, in *London*, who on the 28th of April following presented it for acceptance, which was refused for want of effects, and the bill was duly protested for non-acceptance.

On maturity of the bill, *viz.* June 30th, 1804, it was presented for payment, and refused for the same cause which was assigned for not accepting it.

On the 18th of August, the plaintiff received the protest for non-acceptance in a letter dated at *Birmingham*, May 2d and sent by the way of *Philadelphia*.

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erty of the plaintiff. He could therefore prevent *that* building from being erected. If it was erected by another, in consequence of an alienation of the land on which it was erected, then the means of erecting it was the alienation, which might have been omitted; and of consequence the erection itself might have been controuled by the plaintiff. It does on the whole appear most clear to me, that after the policy was made, the hazard of destruction by fire was increased by means, which might have been controuled by the plaintiff, and that thereby the contract of the defendants is discharged.

Nor do I think that the plaintiff is aided by the verdict. The verdict has found, it is true, that the premises were not repaired or enlarged, *whereby the risk by fire was rendered greater*. The jury, it seems to me, by the verdict have found only the legal inference. From the nature of the contract, in relation to the subject matter, the question was, whether the hazard had been increased by means under the controul of the plaintiff. Now there has been erected, by means under his controul, a building connecting the insured premises with buildings with which it was not connected at the time of the contract; and the inference is, in my opinion, irresistible, that thereby "the risk by fire was rendered greater." The issue therefore, on which the verdict was rendered was, I think, immaterial, and so the finding of the jury ought not to conclude the parties against the truth of the facts.

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On the 3d of September, 1804, the plaintiff's agent called on the defendant in *Portsmouth* for payment of the bill, &c. and presented the protest for non-payment only. The defendant observed to the agent that this was the first information he had received of the bill's being protested; that he had not been notified of its being protested for non-acceptance; that he was not prepared to meet the payment; but that in a few days he would look round, and make preparation for the settlement of it; and other expressions to the same purport. On the 7th of September, being again called on by the plaintiff's agent, he said he had consulted counsel, and now considered himself exonerated from the demand, on account of his not having received notice of the protest for non-acceptance. These last facts were shewn by the deposition of *Benjamin Penhallow*, the agent alluded to.

Ham, the drawer, stopped payment between the 27th of February and the 8th of March, 1804, and on the 14th of April following left *Portsmouth*, and had not returned at the time of the trial. On the 10th of June, 1804, his household furniture was attached, and afterwards sold upon execution. His farm and stock were attached on the 2d of March, and execution was afterwards levied thereon.

Under these circumstances it was contended for the plaintiff on the trial, that no damage happened to the defendant in consequence of the delay of notice to him of the non-acceptance or non-payment of the bill: and that his promise to the plaintiff's agent to settle and pay the same was sufficient to entitle the plaintiff to recover.

Upon these facts the cause was argued at the last July adjournment by *Livermore* and *Sullivan* for the defendant, and *Dexter* for the plaintiff.

Sullivan contended 1. That it appeared from the evidence that the defendant was discharged by the plaintiff's neglect of notice of the non-acceptance of the bill. 2. That there was nothing in the case to shew that the defendant had waived his right to such notice.

At the time when the bill was drawn and endorsed the parties were in good credit, and it was a regular mercantile transaction, not an accommodation bill. When the defendant en-

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dorsed it to the plaintiff, he became liable to pay the amount of it with damages, &c. only on condition that the holder presented it for acceptance in a reasonable time, and in case of its being dishonoured gave due notice to the endorser. He was entitled to that notice as soon at least as it could have been given by the usual course of the post. Such notice can be dispensed with in no case, *even to the drawer*, unless the holder can make it appear that the drawer had no effects in the hands of the drawee. But in no case, and for no reason can *notice to the endorser* be dispensed with, if the holder will resort to him(1).

It was argued at the trial, and probably may be urged to the court here that *Ham* the drawer, having become insolvent, and having left the country soon after the bill was drawn, the defendant had not suffered from not having had notice, and that on this ground the defence ought not to avail him. It is not to be presumed in favour of a negligent holder of a bill, that there were not means of obtaining payment within the power of the endorser, if he had been seasonably notified. Notwithstanding the drawer's absconding and supposed insolvency, he might have placed funds to meet this bill, and might afterwards have otherwise applied them, on finding that the bill had not returned at the expiration of nearly six months from the date. In the case of *De Berdt* vs. *Atkinson*(2), it is said by lord *C. J. Eyre*, that "if the drawer is not *known* to be insolvent, the fact of insolvency will not excuse the want of an early demand." And in *Nicholson* vs. *Gouthit*(3) the same judge says, "It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, but the rule is too stong to be dispensed with."

It was further urged at the trial, that if the plaintiff had been negligent, the defendant had waived all points of defence in this respect, by a subsequent promise to pay. A promise, to bind the party in such case, must have been made with a knowledge of all the facts, and of their legal consequences.

(1) *Goodstrey* vs. *Mead*. *Bull. N. P.* 271.—*Chitty on bills*, 96, 97. 99. —*Peake's N. P.* 202.—*Goodall & al.* vs. *Dolley*, 1 *Term R.* 712.—*Orr & al.* vs. *Maginnis*, 7 *East's R.* 359.

(2) 2 *H. Black.* 337.

(3) *Ibid.* 612.

The case of *Chatfield* vs. *Paxton & Co.* cited in *Chitty* 102, is a strong authority for the defendant on this point. The case of *Goodall* vs. *Dolley* before cited, and that of *Blesard* vs. *Hirst & al.*(4) are also relied on as authorities to shew that the conversation, stated to have taken place between the plaintiff's agent and the defendant, does not amount to a promise or engagement on the part of the latter, obligatory on him either in law or equity.

Dexter, for the plaintiff said, he should not contend that it was not *now* held for law in *Westminster-Hall*, that notice to an endorser was in all cases necessary. But the rule, to the extent to which it is now carried, is of modern date, and he submitted it to the court, whether the law of our country was to change with the varying opinions of *English* judges.

Where no damage could possibly have arisen from the neglect of notice to the party claiming it, it is not easily to be seen why notice should be necessary. Lord *Mansfield* said that insolvency will not excuse, and it has been argued for the defendant that he might have means of securing himself, which afterwards failed him, by reason of the plaintiff's neglect. But in this case the plaintiff has shewn that *Ham* was not only insolvent, but that all his property was gone from him, and that even his body was not within reach of legal process. Of what conceivable use then could notice have been? Certainly not to enable the defendant to secure himself (5).

But if the defendant was entitled to notice, he might waive his right, and the court will be satisfied with probable evidence of the fact of such waiver, when it is first shewn that notice could be of no possible benefit to him.

Against a presumption of the waiver in this case, it was said the defendant was ignorant of the facts and of their legal operation. That he knew all the facts, is very clear; and his ignorance of the law cannot avail him(6).

Livermore, in reply, commented on the cases cited in the opening, and urged their application to the case at bar.

(4) 5 *Burr.* 2670.
(5) See *Kyd on Exchange*, 129. 130. 1 *Bos. & Pul.* 652.—2 *Esp. Rep.* 515.
(6) *Hopes* vs. *Alder* 6 *East's R.* 16. *in notis.*

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The authorities cited for the plaintiff apply only to the cases of accommodation notes, and where the drawee had no effects of the drawer in his hands.

As to the defendant's subsequent promise, which is relied on by the plaintiff, it is not denied that there are one or two authorities which go to support it; but the general current of the cases and opinions are contrary. It may naturally enough be thought that the defendant might believe that regular notice had been forwarded to him by the mail, and that a letter containing it had miscarried, or failed of arriving at the proper post-office, a case which too often happens. But the promise, being grounded on a mistake both of the fact and the law, was void, and if the defendant had paid the money under such a mistake he might recover it back.

If authorities differ, and the court have to settle the point between contradictory opinions, the public convenience, which is in favour of requiring notice in every case, will have weight in forming the decision. This rule, once established, will put an end to litigation on a question which has been heretofore much vexed.

The action stood continued for advisement, and at this term, the opinion of the court (except *the chief justice*, who did not sit in the cause) was delivered by

SEDGWICK, J. [After reciting the facts.] As the plaintiff had notice in *Boston* of the protest for non-acceptance sixteen days before it was communicated to the defendant in *Portsmouth*, there is evidence of laches, which, if not satisfactorily accounted for, are sufficient to preclude the plaintiff from a right to recover in this action. This the plaintiff says he has done by the evidence that *Ham*, the drawer, before the bill came back protested, had failed: that between the 20th of February and the 8th of March, 1804, he stopped payment: that on the 14th of April following he left the country, and has not since returned: that on the 10th of June following his household furniture was attached, and afterwards sold at auction: and that on the 2d of March in the same year his farm and stock were attached, and afterwards taken in execution.

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Whatever effect this evidence might have, if the action was between the payee and drawer of a bill of exchange, we all think that it cannot avail in this case between the endorsee and endorser of a foreign bill.

The drawer of a bill ought to know his relation to the drawee; and when he draws, he undertakes that the drawee shall duly honour the bill. But in the case of an endorser, he does not know, and cannot know, the relation between the drawer and the drawee; and the substance of the obligation he assumes is, that if the endorsee shall use due diligence to obtain the money from the drawee, and is not able to do it; and shall also use due diligence in giving notice thereof to the endorser, that he will then pay the amount of the bill and damages. And we can find no case, in which laches, in either respect, have not been adjudged to discharge the endorser. And the reason as I conceive, is, because by the legal construction of the contract, an endorsee does not undertake to pay, but upon there having been due diligence used in the application to the drawee, and in giving notice of his failure to honour the bill.

But it is said that there is evidence in this case sufficient, if the jury believed it, to establish the facts, that the defendant had waived an objection, which he might otherwise have had, to the plaintiff's right to recover, and had promised to pay the money.

What a man says under the surprize of a sudden and unexpected demand for money ought to be construed with a good deal of strictness. And in this case we are all satisfied, that what the defendant said of paying money, from the payment of which he was discharged by law, ought not to bind him. There was, in fact, no good consideration for the promise.

We are all of opinion that there must be a new trial.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF YORK.

MAY TERM, 1808.

AT YORK.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, } JUSTICES.
HON. GEORGE THATCHER, }

POLLY M'GOOCH, APPELLANT,

versus

ALEXANDER M'GOOCH.

The widow of a deceased intestate is exclusively entitled to the administration of his estate, unless there be among his next of kin a suitable person, whom the judge of probate may think fit to join with her in the trust, or to commit administration solely.

THIS was an appeal from a decree of the probate court for this county, whereby administration of the estate of *John M'Gooch* deceased, who was the husband of the appellant, and son of the respondent, had been committed to them jointly.

By the reasons of appeal, it appeared that the deceased left a child, an infant, who was still living; and that the respondent was a debtor to the estate of the deceased in a large sum, upon an unsettled account.

The appellant claimed the administration alone, contending that under the statute 1783, c. 36. § 6. she was entitled to it, the next of kin being in this case under twenty one years of age: and that the judge of probate has no authority to grant administration to any other, until after citing the widow and next of kin, and their refusal or neglect to undertake the trust.

By the court. The widow, if a suitable person to administer, is exclusively entitled to administration; unless among the next of kin there is some fit person, whom the judge of

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probate may prefer, or who he may think ought to be joined with the widow in a joint administration.

In the present case an infant child is the only next of kin; and he is incapable of the trust from his age. The decree of the court below must be reversed, and administration be granted to the appeliant solely. For this purpose the cause must be remitted to the judge.

Holmes for the appellant.

The solicitor general and *Hubbard* for the respondent.

LEVI ROGERS, PETITIONER, *versus* BENJAMIN HILL.

The affidavit of a petitioner for a review is not received, except as to facts exclusively known to himself, or to obtain an order of notice.

THIS was a petition for a review. The petitioner, in support of his application, offered his own affidavit, that since the former trial he had learned that a certain witness would have testified to facts, which were material in his defence, and that at the time of the trial he was ignorant of this circumstance.

The court refused to receive the affidavit, saying he should have summoned the witness referred to, or have obtained his deposition. The affidavit of a party petitioning for a review, is not to be received except when testifying to facts which can be known but to himself alone, or to obtain an order of notice on his petition.

JONATHAN HAMILTON

versus

ANN CUTTS & OTHERS, EXECUTORS OF SAMUEL CUTTS.

In an action upon a covenant of warranty of lands, the court will receive parole evidence of an ouster.—And the plaintiff will recover in such action, though he may have voluntarily yielded to a dispossession; provided the title to which he yielded be good and paramount to that of his warrantor.

But in such case the burthen of proof will be on the plaintiff. If the eviction be by a judgment at law, such judgment will be plenary evidence, unless it was obtained by fraud.

THIS was an action of covenant broken grounded on a deed made and executed by *Samuel Cutts*, the testator, in the year 1774, conveying to the plaintiff in fee simple one hundred acres of land in *Berwick*, and containing a covenant

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to warrant and defend the granted premises to the plaintiff, his heirs and assigns forever against the lawful claims of all people. The plaintiff alleges that before, and at the time of the execution of the said deed, one *David Moore* was the owner in fee of sixty acres, part of said granted premises; and that in the year 1792, one *Daniel M'Crealis*, who then held all the right and estate of said *Moore*, entered into possession of the said sixty acres, evicted the plaintiff therefrom, and has ever since held and possessed the same.

The defendants, in their plea, traverse the alleged eviction, and issue being joined on the traverse, the cause was tried before *Thatcher*, *J.* at the last October term in this county.

Upon the trial the defendants admitted the title of the sixty acres to be in *Moore* as alleged in the plaintiff's declaration. They also admitted that *M'Crealis*, at the time of the alleged eviction, had all the estate of *Moore*.

The plaintiff called sundry witnesses to prove the eviction. The counsel for the defendants objected to their testimony being received as legal proof of an eviction, contending that an eviction could only take place by means of a recovery at law of the lands from the grantee, and that the only proper evidence in such case was the record of the judgment on which such recovery and eviction were had. The judge overruled the objection and admitted the evidence.

Upon the examination of those and other witnesses it appeared that a short time before the alleged eviction, *M'Crealis* called on the plaintiff, who till then had exercised all the acts of ownership usual in the case of uncultivated lands, and enquired if the plaintiff had a deed of the said hundred acres. The plaintiff said that he had such a deed, and that *Cutts* supposed, at the time of making the deed, that he had a title to the whole lot, but the plaintiff acknowledged that he in fact was entitled to but forty acres. Upon *M'Crealis*' expressing his desire to have his sixty acres set off to him in severalty, the plaintiff gave him liberty to take his share in any part of the lot he might choose, confessing to him that *Cutts*, the grantor, had repaid him part of the consideration money paid for the land, and at the same time expressing his intention of commencing an action against him, unless he re-

paid the whole money for these sixty acres. *M'Crealis* accordingly in the year 1792, did with the plaintiff's consent, as above stated, enter and take possession of sixty acres, part of the granted premises, and has quietly held the same until the time of the trial.

Upon these facts the counsel for the defendants contended to the court and jury that there was no legal evidence of an eviction of the plaintiff from the said sixty acres; and that the action was not maintained.

The judge instructed the jury that, upon the foregoing facts, the plaintiff was entitled to a verdict: and they found their verdict accordingly. The counsel for the defendants filed their exceptions to the said opinions and direction of the judge, and the action was continued to this term upon the defendants' motion for a new trial on the ground of those exceptions.

And now *Mellen* in support of the motion contended that an eviction, in order to give the party evicted a remedy against his warrantor, must be shewn to be by force of a judgment at law; or if a judgment should not be held necessary, still he insisted that the eviction should be against the will of the party, upon whom it was done, and not as in the present case, by his voluntary consent(1).

Emery, for the plaintiff, insisted that the knowledge which the case finds that *Cutts*, the grantor, had of the defect in his title was at least a balance for the plaintiff's yielding quietly to a claim, which it is agreed must have been successful if it had been prosecuted at law.

Eviction is defined in the civil law to be the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, by reason of a right which a third person has to it. And by the ancient common law, if it appeared that the lord had invested his vassal with a fief that did not belong to him, he was bound to give him another fief of equal value, or the price of it in money, as soon as it clearly appeared that the vassal would be evicted of the fief(2): so that actual ouster was not necessary to entitle the party to his remedy on the warranty.

(1) *Jacobs' Dict. Eviction.*
(2) *Hargrave and Butler's Notes on 1 Inst. Lib. 3 Note 315.*

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There could be no reason that the plaintiff should resist the claim of *M'Crealis*, which not only he himself, but Mr. *Cutts* his warrantor also, was well satisfied must prevail. To have insisted on a judgment at law would have been adding the expense and vexation of a suit at law to the damages he must finally recover against *Cutts* on his warranty.

The opinion of the court was afterwards delivered as follows by

PARSONS, C. J. This is an action of *covenant broken* on a deed of the defendants' testator, conveying 100 acres of uncultivated land with general warranty. The plaintiff assigns as a breach of this covenant, that at the time of the conveyance one *Moore* was lawfully seized in fee of sixty acres, parcel of the said 100 acres, and that afterwards one *M'Crealis*, holding *Moore's* title, had entered into possession of, and evicted the plaintiff from the said sixty acres. The defendants traverse the eviction, and issue being joined thereon, a verdict is found for the plaintiff. The cause now comes before the court upon a motion for a new trial by the defendants for a supposed misdirection of the judge at the trial.

The *first* objection is, that the judge admitted parole evidence to prove the eviction, which the counsel for the defendants contend can only be proved by the record of a judgment at law. And we are all of opinion that, to prove an eviction, according to its strict and technical meaning, a judgment of court is necessary. But we are inclined to give to the term a more extended signification, and to understand it in this case as synonimous with ouster.

But *secondly* it is contended that here was no legal evidence of an ouster; because the dispossession took place with the consent of the tenant in possession.

It is true that if the tenant consents to an unlawful ouster, he cannot afterwards be entitled to a remedy for such ouster. But an ouster may be lawful; and in that case the tenant may yield to a dispossession, without losing his remedy on the covenant of warranty, which in this state is a personal action of covenant broken. There is no necessity for him to involve himself in a law-suit to defend himself against a title, which he is satisfied must ultimately prevail.

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But he consents at his own peril. If the title, to which he has yielded, be not good, he must abide the loss: and in a suit against his warrantor the burthen of proof will be on the plaintiff: although it would be otherwise in case of an eviction by force of a judgment at law, with notice of the suit to the warrantor. For in such case, unless it be obtained by fraud, the judgment itself will be plenary evidence.

In the case at bar it appears that *M'Crealis* had a good title to the sixty acres, paramount to the title of *Cutts*. And the plaintiff, by consenting to his taking possession, did not lose his remedy for this lawful ouster against his warrantor.

Judgment according to the verdict.

6 Johns. 158.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF CUMBERLAND.

MAY TERM, 1808.

AT PORTLAND.

PRESENT.

Hon. THEOPHILUS PARSONS, CHIEF JUSTICE.
Hon. SAMUEL SEWALL, Hon. GEORGE THATCHER, } JUSTICES.

DANIEL DRINKWATER,

versus

SYLVANUS DRINKWATER, ADMINISTRATOR OF PYAM PRINCE.

When the estate of one deceased is not insolvent, a creditor, who has obtained a judgment against his estste in the hands of his administrator, may levy his execution on real estate fraudulently conveyed by the deceased: or the administrator, being licensed to sell the estate of his intestate, may sell estate so conveyed: in whose hands soever it may be.—

Lands of a deceased intestate are not liable for the charges of administration.

An administrator, as such, cannot maintain a real action to recover possession of the real estate of his intestate, except such as was mortgaged to the intestate.

Neither can an administration defend in any real action brought against him in that capacity by any one claiming as a purchaser from the intestate, whether the purchase was *bonâ fide*, or fraudulent as to creditors.

This was a writ of entry, wherein the plaintiff declares that the said *Prince*, on the 23d day of September, 1803, was seized in fee of the premises demanded, and being so seized by his deed of that date, duly executed and recorded, for the consideration of 500 dollars, conveyed the same to the plaintiff, to hold in fee and in mortgage: and that he ought to be in quiet and actual possession of the same: but that the said *Sylvanus* had, since that time, entered into the premises, and still holds possession thereof from the demandant.

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Upon the general issue pleaded, the cause was tried at the last October term in this county, before *Thatcher*, *J.* and a verdict taken for the defendant, subject to the opinion of the court, upon a report of the evidence to be made by the judge: it being agreed that if the court should be of opinion that the verdict was wrong, it should be set aside, and judgment be entered against the defendant upon his default, as in case of a mortgage.

The deed was produced at the trial, and its due execution was admitted by the defendant, as also the note mentioned in the deed for 500 dollars payable in two years from September 23d, 1803. On the part of the plaintiff it was admitted that the witness to the execution of the deed saw no money paid, and did not know that any had been paid. Several of the plaintiff's witnesses testified that, after the making of the mortgage, *Prince* applied to them to induce them to buy a part of the mortgaged premises, and said that the money would answer for the plaintiff as well as the land. The widow of *Prince* testified that she knew that her husband, both before and after making said mortgage deed, had frequently received sums of money of the plaintiff: and that about the time when the mortgage deed purports to have been made, he came home on a certain day, and said he had been to make a mortgage of his wood lot, and of the lot on which he lived, to the plaintiff: that about the same time she saw her husband have in his hands a number of papers, which appeared to have been notes made by him to the plaintiff, having pieces torn out of them in the places where the signature is usually made; and that on asking him what they were, he said they were the notes which he took up when the mortgage was made: that in the fall of the year 1804, she knew he was endeavouring to procure money by the sale of the mortgaged premises, to pay the plaintiff what he owed him: and that the notes aforesaid, with the signatures torn off, were, after his decease, delivered to the defendant.

On the part of the defendant, several witnesses testified to conversation at different times with the plaintiff, after the making of said mortgage, in which he informed them that he never gave any valuable consideration for said mortgage deed

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or note, and that they were intended only as a cover to secure the premises from certain creditors of the said *Prince*. The plaintiff objected to the admission of this evidence; but the objection was overruled. The defendant also produced a copy of his administration account, settled in the probate office on the 8th of July, 1807, from which it appeared that the personal estate of said deceased, in the hands of the defendant as administrator, exceeded the amount of claims paid, or then existing against said estate, in the sum of 159 dollars, 97 cents. But it appeared that the costs already arisen in this cause exceed said sum: that the real estate, for which this action was brought, was inventoried as the estate of said *Prince*: and that the said estate was under a commission of insolvency when this action was commenced.

And now *Mellen*, of counsel for the defendant, being called by the court to support the verdict in this case, admitted that a fraudulent conveyance was good and binding on the parties to the fraud: but he contended that in case of an action upon a mortgage deed, the court must first determine that something is due to the plaintiff, before the conditional judgment can be rendered in his favour. Now if in the case at bar, the court are satisfied that nothing was ever given for the mortgage declared on, they cannot say that any thing is due to the plaintiff on that account. Where nothing has been lost, no imdemnity can be justly claimed.

Further, though generally the grantor or his administrator shall not be permitted to go into evidence to shew fraud, yet the administrator of an insolvent estate stands on different ground. He is the agent and trustee of the creditors, as against whom such a conveyance is undoubtedly void: and although the creditors may individually have another remedy, yet it will prevent the multiplication of suits, and other mischiefs, to admit the administrator to avoid the deed in the first instance, for the benefit of the creditors generally.

Whitman, for the plaintiff, after observing that this estate would not be insolvent, but for the expense the defendant had put it to in defence of this action, was stopped by the court, whose opinion was afterwards thus delivered by

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PARSONS, C. J. The plaintiff has sued a writ of entry against the defendant to foreclose a mortgage made to him by *Prince*, the intestate. On the trial he produced the mortgage deed, the execution of which is agreed. The defence is that the mortgage is not *bonâ fide*, nor for valuable consideration, but made to defraud the creditors of the mortgagor. And the question submitted is, whether in this case it is competent for the defendant to make this defence.

A conveyance to defraud creditors is good against the grantor and his heirs, and is void only as to creditors. For neither the grantor, nor his heirs claiming under him, can avail themselves of any fraud, to which the grantor was a party, to defeat any conveyance made by him. The intention of the law, in establishing this principle, is effectually to prevent frauds, by refusing to relieve any man or his heirs from the consequences of his own fraudulent act. If creditors have been injured by the fraud, they are entitled to relief; and as to them a fraudulent conveyance is void.

When the estate is not insolvent, a creditor may have the benefit of the estate fraudulently conveyed in two ways. He may recover judgment against the administrator, and may extend his execution on the estate: or the administrator, having obtained license may sell the estate at public auction, and out of the proceeds may satisfy the creditors. But the creditors of the intestate *Prince* are not affected by this mortgage, unless there is a deficiency of personal assets. The evidence to prove a deficiency of personal assets is to be derived from an administration account settled by the defendant July 8th, 1807, and from his claim to be allowed the costs of this suit. In looking into the account settled, it appears that, after all the debts are paid, there is a balance of personal assets in his hands amounting to 159 dollars, 97 cents. To this sum must be added 17 dollars, 40 cents, the charges for dividing other real estate. The judge has also allowed him the very extraordinary claim of 172 dollars, 31 cents for the expenses of lawsuits: I say extraordinary, for the estate does not appear to have derived any benefit from them, as no judgments recovered are credited, while the estate is charged with 89 dollars, 3 cents due on report of referees.

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In any view therefore that can be taken of this account, it is most manifest that the intestate left personal estate more than sufficient to defray the charges of administration, and to pay all his debts. And as 9 dollars, 25 cents are credited for the income of real estate, and there is also a charge for partition, it must be presumed that the intestate left real estate not incumbered by this mortgage.

From these facts we must necessarily infer that the mortgage cannot in law be deemed fraudulent against creditors, unless the defendant has a lien on the lands mortgaged for the costs of this suit. It may be proper therefore to consider the connexion an administrator has with the real estate of his intestate.

At law the lands descend to the heir subject to the payment of debts, if there be a deficiency of personal assets. The administrator frequently enters on the lands, and accounts for the rents and profits in the probate court; and this practice may not be inconvenient to the heirs. For the profits become a part of the fund, if wanted, for the payment of the debts; and, if not wanted, they form a part of the distributive shares of the personal estate. But in law the administrator has no right to enter into the lands, or to take the profits. He has no interest in them, but a naked authority to sell them on license to pay the debts, when the personal estate is insufficient. And lands not being liable for the payment of debts at common law, they are made liable by statute, which does not extend the liability to the defraying the charges of administration. The personal estate alone is a fund for the payment of those charges. It is true that when lands, recovered by an administrator by foreclosing a mortgage, or taken in execution to satisfy a judgment in a personal action, are sold on license for the payment of debts, the proceeds of the sale are considered as personal assets, and liable for the charges of administration, because those lands were received in satisfaction of personal assets belonging to the intestate at his death. Also when lands, of which the intestate died seized, are sold on license for the payment of debts, the court authorize the sale of lands enough to defray the charges of the sale, and of accounting for the

proceeds. Because the statute giving an administrator a power to sell lands on license, the court granting the license must, by a reasonable construction, have authority to indemnify him in executing the power. So also a judgment creditor may levy his execution for his costs, as well as his damages, on the land.

But the administrator having no interest in the lands of the intestate, unless they have been mortgaged to him, and having no right of entry, he cannot bring any real action to recover seizin or possession of them. He cannot count on the seizin of the intestate, for he derives no interest in the lands from the intestate by virtue of his administration. Nor can he count on his own seizin, for his entry on the tenant in possession will be tortious.

If the lands are liable to the payment of the intestate's debts, he may lawfully sell them on license, whether they are in the possession of the heir, or of his alienee or disseizor. For no seizin of the heir, or of his alienee, or of his disseizor, can defeat the naked authority of the administrator to sell on license. Thus also when an authority is given by the testator to his executor to sell his lands for the payment of his debts, the executor may sell notwithstanding the death or alienation of the devisee; and for the same reason, notwithstanding his disseizin. And the purchaser, by virtue of his deed, may lawfully enter into the lands sold; and may count on his entry as a lawful seizin, and try his title, if it be disputed.

If the lands of the intestate are wanted for the payment of his debts, as the administrator has no cause to recover the possession by a suit at law, so to allow real actions to be maintained by him would be mischievous. If the deficiency of personal assets amount to 50 dollars, how much land may he demand of the alienee of the heir, if he is in possession? or by what description? shall he demand a large farm worth 5000 dollars? and if he cannot recover the whole, what part shall he recover? If he recover the whole, after land sufficient to pay the debts and charges of sale are sold, how is the defendant, who has lost his land by a judgment at law, to regain his seizin of the remainder? but if the admin-

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istrator proceed, without action to sell, the owner of the land may, by becoming the purchaser, protect his own title; or if others will give more, enough may be sold, and his title to, and possession of the remainder will continue undisturbed.

It may be objected, that if the purchaser at public auction conceives that he purchases not only the land, but a law suit, he will offer a much less sum, and cause more land to be sold. This is true; but it will be the folly of the owner of the land, by setting up his title as adverse to the sale, to lose more of his land: and if the administrator had no authority to sell the land, there is no reason that he should charge the estate with the expenses of a fruitless law suit.

After explaining the connexion of the administrator with the lands of his intestate, we must infer from it, that the administrator cannot defend in any real action brought against him as administrator, by any person claiming as a purchaser from the intestate; whether the purchase be *bonâ fide*, or fraudulent as to creditors. A recovery against him cannot prejudice the creditors: for their right to levy their executions on the land, and his right to sell on license, remain the same after as before the recovery.

As the defendant has therefore no claim on the lands mortgaged, to reimburse him his expenses in defending this action, the creditors are not in any manner interested in the event of the suit: and for the benefit of creditors only can the conveyance of the mortgagor be shewn to be fraudulent: for as to all persons claiming as heirs to him, a conveyance cannot be impeached by a fraud, to which the grantor was a party. The expenses of this defence are unnecessary, and imprudently incurred: and so far are they from a charge on the intestate's land, that the administrator ought, in equity, to pay them out of his pocket, and not charge them against the estate.

Defendant defaulted.

THOMSON BAXTER *versus* DANIEL TABER.

DEBT on bond, dated May 25th, 1805, conditioned that *Thomas Holbrook*, jun. who was joint obligor in the bond, and was imprisoned in the prison at *Portland*, in this county, by virtue of an execution issued against him upon a judgment obtained against him by the plaintiff, "continue a "true prisoner, in the custody of the gaoler, and within the "limits of the said prison, until he shall be therefrom lawful-"ly discharged, without committing any manner of escape."

The sessions have no authority to extend the limits of the gaol yard beyond the land of the county, with the highways adjoining or leading to the prison.

If a debtor in prison, having the liberty of the yard, be suddenly seized with illness in the highway, and be necessarily carried to a private house, this is no escape within the condition of his bond, if he return to the prison as soon as he has reason and strength, or if he die before.

It was agreed by the parties that the said *Holbrook*, after the making of the said bond, and until the 25th day of June following was accustomed, in the day time, to go to and frequent any part of the said town of *Portland* lying within the limits specified in an order of the court of sessions for the county of *Cumberland*, made in October, 1798, whereby they fixed and determined "*the limits or bounds of the* "*town of* Portland, *exclusive of the islands, as the limits* "*and boundaries of the gaol yard.*" On the said 25th day of June, the said *Holbrook*, being in a low state of health, and being at a place called *King-street*, more than one hundred rods distant from said prison, was seized with such a degree of ill health, as that it was deemed necessary to convey him to the nearest dwelling house he could be conveyed to, which was not in fact within one hundred rods of said prison, where he continued languishing until he died. During the period he so continued at said dwelling house, he could not, in the opinion of the attending physician, be conveyed therefrom to said prison, without manifest danger of his life.

If upon these facts the court should be of opinion that the said *Holbrook* performed the condition of the bond, according to its true intent and meaning, the plaintiff was to become non-suit: otherwise the defendant was to be defaulted.

Whitman, of counsel for the plaintiff, observed that on the facts in the case two questions naturally presented themselves, *viz.* 1st. Whether the court of sessions had authority to make the order referred to: and 2d. Supposing them to have

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had such authority, whether the circumstances of this case shew a legal excuse for the prisoners being out of the prison in the night time.

The authority of the court of sessions, in this regard, is derived from the statute of 1784, c. 41. § 9. whereby it is enacted that "the court of general sessions of the peace shall "fix and determine the boundaries of the gaol yards to the "several gaols appertaining in their respective counties, as "soon as may be after the publication of this act." In a previous part of the same section, the yard is expressly described as within the prison.

Every statute is to receive a reasonable construction: but it is an extravagant and unreasonable supposition, that it was the intention of the statute that a person, who was in prison for the purpose of being compelled to pay his debt if he was able, and who was in the night time confined to a chamber, should in the day time have the full range of a large town. Such a liberty would be wholly inconsistent with the object of the law in imprisoning debtors. The word *yard* means a place enclosed with fences, something more than an imaginary and invisible boundary. The yard of a prison ought to be exclusively occupied by the prisoners, and not to include in its extent all the citizens and strangers in a large and populous town.

It is believed that the sessions cannot legally extend the limits of the yard beyond the land owned by the county, and appurtenant to the prison. If they can thus by a simple order, convert every dwelling house in the town into a part of the prison, it must follow that the sheriff, as keeper of the gaol, will have a right to enter every house in the town, and every apartment in it. And it must also follow that the prisoners, who have the liberty of the yard, have also a right to visit every house without committing a trespass.

These boundaries include not only all the buildings in the town, but even the public highways, which from the nature of the thing can neither be enclosed or appropriated to any other use than that of the citizens in general to travel over.

As to the 2d question, *Whitman* said, he would not attempt to maintain it, if the first was ruled against him. He

yielded to the soundness of the maxim of the law, that the act of God shall not be construed to operate an injury to any man.

Hopkins, for the defendant, contended that the sessions having executed an authority given them by statute, whether they had executed it well or ill, their act must be valid until reversed by themselves, or by a superior tribunal. If the gaol yard is not such as they have limited, then there is not, to this day, any gaol yard in the county; and the beneficent purposes of this statute are nulified. It must be confessed that the statute is, to say the least of it, very obscurely and inaccurately penned. The yard is mentioned as within the prison. But it could never be so intended. A yard necessarily implies an open, uncovered area. The universal practice under this statute has been to assign an open unenclosed space as a yard for the refreshment of those, who with the aid of their freinds in becoming sureties for them, could entitle themselves to such an indulgence.

Whitman in reply. The sessions acted in this manner as ministerial officers only, and in no respect in their judicial capacity. They were therefore bound, as other ministerial officers are, to a strict performance of their duty. If they exceeded the authority given them, their act was void. If their act, so far as it extended the limits of the prison yard beyond the boundaries of the county land, was void, as is humbly presumed, then the prisoner, *Holbrook*, was guilty of a breach of the condition of his bond, by going into the highway.

The opinion of the court was afterwards delivered as follows by

PARSONS, C. J. This cause is submitted to the decision of the court upon a case agreed by the parties. *Thomson Baxter*, the plaintiff, has sued *Daniel Taber*, as surety in a bond, in which *Thomas Holbrook*, jun. was principal, given to the plaintiff, to be forfeited, if *Holbrook*, who was committed to the gaol in *Portland* on execution at the plaintiff's suit, did not continue a true prisoner within that prison, until lawfully discharged.

It is necessary to decide what privileges *Holbrook* acquired by virtue of this bond; and whether from the facts agreed he had unlawfully exceeded those privileges.

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By several provincial statutes it was made the duty of the courts of sessions to erect a prison in their respective counties, containing apartments within it to lock up debtors separate from felons and other criminals; to provide apartments belonging to the prison, in which debtors, who had given bonds to indemnify their creditors against escapes, might have chambers at a small weekly rent; and a yard appurtenant to the prison, the liberty of which debtors, who had given this indemnity, might be allowed in the day time. All these apartments, whether in, or belonging to the prison, and the yard appurtenant, were a part of the prison. The sheriff had the custody of the prison, by himself or by a gaoler his deputy, whose duty it was to lock up criminals in some safe apartment in the prison; and also debtors, who had not given the bond of indemnity; but apart from criminals. And to debtors, who had given this bond, he was obliged to allow chambers belonging to the prison; and he could not lawfully restrain them from the liberty of the yard in the day time, as this privilege was secured to them by statute. As the sessions were authorized to provide a yard appurtenant to the prison for the ease of debtors, to accommodate them with air and exercise: the sessions must necessarily have power to ascertain its boundaries, without any express directions given for that purpose.

These several provisions were re-enacted by the statutes of 1783, c. 44. and 1784, c. 41. There cannot be any doubt that the yard is a part of the prison; for the 9th section of this last act allows to debtors the liberty of the yard, but not to pass without the limits of the prison: and a part of the condition of the bond, given by a debtor to obtain the liberty of the yard in the day time, is that the debtor shall continue a true prisoner, in the custody of the gaoler, within the limits of the prison.

Previous to the passing of this last act, no doubts had been entertained as to the liberty of the gaol yard. The sessions had never attempted to make any land a part of the yard, but their own land, or land over which they had some controul but a power in the sessions to make the closes or houses of others a part of the yard appurtenant to the county gaol, which the sessions were to provide, was, I believe, never con-

ceived to belong to that court. At the close of the ninth section, it is made the duty of that court to fix and determine the boundaries of the several gaol yards to the several gaols appertaining, as soon as might be after the publication of that act. By this clause no new power is given to the court of sessions. Before this time, it might fix the boundaries of the gaol yard; and as the county might own more land, adjoining on the prison, than might be thought necessary for a yard, and which it might be convenient to appropriate to some other use, doubts as to the limits of the yard might exist, which the sessions were enjoined seasonably to remove by ascertaining those limits.

But it is urged that, by virtue of this clause, the sessions may extend the limits of the gaol yard, at its pleasure, including within its limits a whole town, and making every man's house and land a part of the prison, of which the sheriff has the custody. And the boundaries of the *Portland* gaol, as fixed by the order of the sessions, which is a part of the case, affords some presumption that the court of sessions for *Cumberland* in the year 1798, were of this opinion.

We are however satisfied that no opinion could have less foundation. This last act gives, in this respect, no new powers: and the practice, for half a century, under the former laws, is irresistible evidence of the construction of the power in the sessions to fix the limits of the prison. Now in virtue of this power it is said that every man's house, and garden, and close in *Portland* is made a part of the county gaol, of which by law the sheriff has the custody, by being made a part of the yard appurtenant to the prison. To give a power of this extent to the session could not have been within the intent of the statute: and if the legislature had intended it, it is manifest that the execution of the power would have been unconstitutional, as it would have been an appropriation of private property to public uses without compensation to the proprietors.

Neither can this power be considered as analogous to the jurisdiction of the *king's bench* in fixing the boundaries of the rules of their prison. That court may order their prison to be located at its pleasure: and because the prison is

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not large enough to contain all the prisoners, the court have authorized the marshal to keep his debtors within certain limits, without the walls of the prison, ascertained by a rule of the court, and hence called *the rules of the prison.* It remains at the discretion of the marshal, how far he will grant this permission to debtors; for he is still answerable to the creditor for an escape from the rules. And having granted this permission, he may revoke it, and lock up his prisoner, if there should be danger of an escape: or if he escape against the will of the marshal, he may retake him on fresh pursuit. And on granting permission, he may take bonds from the debtor conditioned that he shall be a true prisoner; which are held good, and not as given for ease and favour. But the rules of the prison are not stated or considered as a gaol yard appurtenant to the prison, which debtors are allowed on any terms to have, against the will of the marshal.

The law in this state is very different. The prison, including all the apartments and appurtenances, is provided at the expense of the county, which is answerable for all escapes of debtors through the insufficiency of the gaol, the justices in sessions being for this purpose the agents for the county, as well in raising as in appropriating the money. And the sessions only have authority to locate and erect the prison, and limit its boundaries, without the controul of any other court. And as the gaol yard, to be provided for the accommodation of debtors, must be not only a part of, but appurtenant to the prison, it is unreasonable to consider the enclosure or the dwelling house of any man as part of a yard appurtenant to a gaol; which must be considered to be some open area, which the debtor may lawfully enter in the day time.

But this extravagant construction of the powers of the sessions may perhaps be contended for, as beneficial and humane to debtors. The genius of our laws is certainly humane to debtors; perhaps without sufficiently distinguishing between debtors in execution for breach of contracts, and those who have been convicted of personal torts. The design of the statute, in this case, is to grant them relief from close confinement, that they may preserve their health by using exercise and fresh air, without giving indulgences, which should

induce an able but fraudulent debtor to withhold from his creditor a just debt. If the debtor alleges that he is unable to pay, and will satisfy two justices of the peace, by his examination on oath, of the truth of his allegations, he will be discharged: and this discharge may generally be effected in thirty days. But if able to pay his debts, it is not an unreasonable hardship, that he should be coerced by confinement to apartments belonging to the prison, with a liberty of the yard appurtenant, for air and exercise.

There is another consideration, which has great weight in our minds. Imprisonment for debt ought to be exercised impartially: but on the construction contended for, many great advantages are secured to a debtor, who lives in the town, where a county gaol is erected. If this construction should prevail, a debtor in *Portland*, when in execution, after he has given bonds, is subject to no other restraint than keeping in some hired apartment belonging to the prison during the night; but in the day he may live with his family, and pursue his business, or amusements, at his pleasure, either on land or water, so that he does not leave the town, or go on the islands; for it should seem that the waters of the harbour within the town are, by the magic of this power, transferred to a part of the gaol yard.

But it has been argued, that admitting the court of sessions has exceeded its power, yet the order must be effectual according to the terms of it, until it is rescinded on *certiorari*. We greatly doubt whether in this case a *certiorari* could lawfully be issued. This order of the sessions does not appear to be a judical act; but done in execution of the powers vested in the justices by law, as ministerial agents for the county: like the powers they have to purchase lands, and to erect court houses, gaols, and houses of correction, for the use of the county; or to make contracts in behalf of the county; allow accounts, and issue orders for payment. But if a *certiorari* lies, yet it is very clear, that when it appears on the face of an order of sessions, made in execution of powers like these, that no powers exist for passing the order, it must be deemed *ipso facto* void, so far as it is founded on an excess of legal powers. But it may be good so far as the

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powers of the sessions extend, whether they have been used discreetly or otherwise.

We fear that the powers on this subject, which the sessions supposed they possessed, and the manner, in which they may have been exercised, may have ensnared some persons, confiding that the legal powers had not been exceeded. We shall greatly regret this effect; but we cannot prevent it. Inconveniences to individuals cannot alter the law, nor bend it to particular cases. We must execute it impartially, and dispense the same measure of justice to all the citizens, uninfluenced by their rank, station or circumstances. Few, if any, creditors will probably avail themselves of any mistake to charge an humane surety: and certainly not he who lives

> "Beyond the fix'd and settled rules
> Of vice and virtue in the schools,
> Beyond the letter of the law."

As we cannot construe the powers of the sessions, as coextensive with the terms of the order, we shall consider what liberty may be lawfully allowed under it to a debtor in execution. And we are of opinion that the debtor's liberty extends to all the grounds, the property of the county, appurtenant to the prison: and further, as the public streets and highways are open to all the citizens; as any man, without being a trespasser, may use them as well for air and exercise as for other purposes, we do not feel ourselves obliged to restrain the sessions from considering them, when adjoining on, or leading to the prison, as part of the gaol yard: for in fact, when the public necessity or convenience require it, an highway may be located by the sessions over the yard. But further than this we cannot go. We cannot admit that the sessions can, by any order of theirs, make the private property of others, of which by law they have the exclusive use, a part of the county prison.

Having thus given as we conceive, the most liberal limits of the yard, within which a debtor must be restrained, which the law allows, we shall now examine the facts in the case, to determine whether *Holbrook*, the debtor, did or did not escape without those limits. The case seems to have been hastily drawn up, and without much precision; and we must form

as correct a statement of the facts as we are able. It is stated that after the execution of the bond, *Holbrook* was accustomed to go to and frequent any part of *Portland*, in the day time, within the limits ascertained by the order. From this statement we cannot conclude that he in fact went to any part of the town, to which he might not lawfully go. He might not leave the public streets, or invade the private property of any man: and we cannot necessarily infer that he has broken the condition of the bond. It is further stated that, being at a place called *King-street*, which we may presume is a public street in *Portland*, he was suddenly taken sick, and was necessarily conveyed to a private house, where he languished until he died, as he could not be removed to the prison, without manifest danger of his life. From the liberty we have supposed debtors in execution entitled to under the order of the sessions, we connot consider *Holbrook's* being in *King-street* as an escape. Had he voluntarily left the street, and entered the private house, it is our opinion that it would have been an escape.

But was the conveying of him to this house by others, in consequence of his sudden sickness, a breach of the condition? After the fullest consideration we have been able to give this question, we are satisfied, that to constitute an escape, within the intent of this bond, there must be some agency of the debtor employed: and a conveying of him without the limits of the prison, he not consenting, is no escape, if he return as soon as he has the ability.

If any force, not of an enemy, should break open a gaol, and a prisoner, availing himself of the breach, should leave the prison, or suffer himself to be rescued, it would be an escape. But if he was carried away by violence, and voluntarily returned as soon as the force ceased, it is not clear that at law it would be considered as an escape. And if a debtor who had entitled himself to the liberty of the yard by giving bond, should be forcibly carried without the limits, and should return as soon as the force ceased, perhaps it might not be a breach within the true intent of the bond. If he is visited by sudden sickness, so extreme that he is carried to an adjoining

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house, without any agency or direction of his own, but by the humanity of others, we are satisfied that this would be no escape, if he returned as soon as he had reason and strength: and if he died before, the bond would be saved. For it happened by the providence of God, which shall hurt no man. This is the case before us. *Holbrook*, while lawfully in the street, was suddenly visited with extreme sickness which made it necessary to carry him to a private house. There he languished until he died, as a return to the prison would manifestly have endangered his life.

It is our opinion that this was not an escape within the true intent of the condition of the bond. According to the agreement of the parties the plaintiff must be called.

Plaintiff nonsuit.

RICHARD H. AYER *versus* NATHANIEL HUTCHINS AND AL.

If an endorsee of a promissory note receive it under circumstances which might reasonably create suspicions that it was not good; as if he receive it after payment has been refused, or some time after it is made payable or if the endorser is not to be liable on his endorsement, the endorsee takes it subject to any legal defence, which might be made against a recovery by the promisee.

ASSUMPSIT on a promissory note subscribed by the defendants, payable to *Philip Page* or order, and by him endorsed thus, "For value received pay the contents to *Richard H. Ayer*, I being no way liable as endorser."

Upon *non assumpsit* pleaded, a trial was had before *Thatcher, J.* at the last October term in this county. After a verdict for the plaintiff the defendants filed exceptions pursuant to the statute, which being allowed by the judge, the cause was continued to this term for the opinion of the court.

From the exceptions it appears that, after the note was produced to the jury, to which no objection was made by the defendants, they offered to prove to the jury that the note was given for an illegal consideration, and with that view to give evidence of the following facts: that *Page*, the original payee of the note, at the time of its date was a deputy sheriff for the

An agreement to indemnify an officer against a voluntary escape is void, as against the policy of the law.

county of *York*, and then had in his custody one *William Eaton*, a prisoner in execution at the suit of one *Benjamin Kimball*, whom he was conveying to the prison in *York*: that *Page* proposed to procure for *Eaton* the liberty of the prison yard: that the defendants agreed to give bond to *Page* to indemnify him against the damage he might sustain by *Eaton's* escaping from him on the way to the prison, or by a breach of his bond for the liberty of the yard: that there was no person present at the time capable of writing the bond; and instead thereof the defendants gave the note declared on to *Page* to indemnify him as aforesaid: that in case *Eaton* did not escape, or break the prison bond, which *Page* had proposed to procure for him, the note was to be void, and to be given up to the defendants by *Page:* that *Page* then took *Eaton* to *Portland* in the county of *Cumberland*, and there finding it inconvenient for him, *Page*, to go to *York*, he voluntarily dismissed his prisoner: that the said note was not given up by *Page* to the defendants, but was in about eight months after its date, negotiated to the plaintiff, without his knowledge, and for the benefit of *Page*.

The judge refused to admit the evidence proposed to be given, and directed the jury to find a verdict for the plaintiff.

The cause was submitted to the court without argument, and their opinion was afterwards delivered by

PARSONS, C.J. The plaintiff declares on a prommissory note given by the defendants to one *Philip Page*, payable to him or his order on demand and endorsed to the plaintiff. On the general issue, the defendants offered evidence to prove that the note was endorsed to the plaintiff about eight months after it was given, by a special endorsement, purporting that the endorser was not to be liable in any way for the payment; that the endorsement was made without the knowledge of the plaintiff, and for the benefit of *Page*, the original promisee; and that the note was fraudulently obtained by *Page*. And this evidence was rejected by the judge.

The first question for our consideration is, whether, as between the parties to this action, fraud could legally be given in evidence to defeat the recovery by the endorsee.

By virtue of the statutes against gaming and usury, negotiable notes, given for a gaming or usurious consideration, are

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absolutely void in the hands of innocent endorsees. But at common law the promisor cannot give in evidence against an innocent endorsee, who came honestly by the note, without any reason to suspect that it was not good, any illegality in the consideration, or fraud in obtaining it, or a subsequent payment(1). If the endorsee receives the note under circumstances, which might reasonably create suspicions that it was not good, he ought, before he takes it, to enquire into the validity of the note; and if he does not, he must take it subject to any legal defence, which might be made against a recovery by the promisee. And it has been determined, that the indorsement of a note, after payment has been refused, is a circumstance, which ought to awaken the suspicion of the endorsee, and to lead him to further enquiries before he takes it: and that a note endorsed some time after it is due furnishes a presumption that it has been dishonoured; because it may reasonably be inferred that the holder of the note would prefer receiving the money due, if payment could be had, to a negociation of the note.

A note payable on demand is due presently. In this case the note had been due eight months before it was endorsed, a length of time sufficient to induce suspicions that the promisors would not pay it, and to cause some enquiry to be made, whether it had in fact been dishonoured, or why payment had not been made. If there was no other circumstance, this would be a good reason to let the defendants into any defence which could legally be made by them, if *Page* were the plaintiff.

There is however another fact of importance. It was alledged that *Page* was not to be liable on his endorsement, if the defendants refused payment. A caution of this kind must certainly induce an endorsee to believe that payment had been demanded, or that the demand had been neglected from a certainty of refusal, unless the endorser assigned some other reason. An endorsement of this nature, made eight months after a note is due, is enough to charge the endorsee with such negligence in making further equiries, as will subject him to the same defence, that might be made against the endorser.

(1) *Brown* vs. *Davies*, 3 *Term R.* 80.

But evidence was also offered, that the endorsement was in trust for the endorser himself. If this was the case, whether the note was endorsed before or after it became due, we are satisfied that any evidence may be admitted against the trustee, which might have been admitted against the *cestui que trust*, if he had sued the note as promisee.

The next question is, whether the defence offered and rejected would have supported a legal defence against *Page*.

Page, was a deputy sheriff, having a prisoner in custody on execution, whom he was carrying to gaol, and having proposed to the defendants to procure for the prisoner sureties to entitle him to the liberty of the prison yard, the defendants agreed to give him bond to indemnify him against the escape of the prisoner, either before he was committed, or after he had the liberty of the yard : and no scrivener being present to write a bond, the note was made and given, upon the express agreement of the defendants and *Page*, that the note was to be void, if no escape was committed, otherwise he was to retain it as an indemnity. But *Page*, without proceeding to the gaol with his prisoner, voluntarily discharged him.

If these allegations had been proved against *Page*, it is very clear that he could not have recovered. The only ground on which he could claim payment of the note, is as an indemnity. The escape, contemplated by the parties before the prisoner was committed, must have been an escape against the will of the officer : but there was no escape against his will, for he voluntarily discharged his prisoner, and is entitled to no indemnity against his own wrong. And if the parties had contemplated a voluntary escape, then the consideration of the note would be illegal ; for an agreement to indemnify an officer for a voluntary escape is void, as against the policy of the law.

As we are of opinion that the evidence ought to have been admitted, the verdict must be set aside, and a new trial granted.

Emery for the plaintiff.

Dana for the defendants.

EBENEZER MAYO

versus

MAINE FIRE AND MARINE INSURANCE COMPANY.

Underwriters upon freight are not liable for a detention of the ship on the voyage, if she finally earns her freight.

THIS was an action upon a policy of insurance upon freight, and was tried May term, 1806, before *Sewall, J.* A verdict was found by consent for the plaintiff, subject to the opinion of the court upon the report of the judge. The substance of that report is recited in the opinion now delivered by *the chief justice*, the cause having stood continued to this term, and having been submitted to the court without argument.

PARSONS, C. J. It appears from the judge's report, that the plaintiff was the owner of the brigantine *Harriot;* that she sailed on the voyage insured with a cargo on freight for a port in *France*, the vessel and freight being both insured; that during the voyage the vessel was captured, and carried into *Plymouth* in *England*, where she was detained two months, after which she was liberated, proceeded on her voyage and the cargo was delivered to the consignees at the port of original destination in *France*, by whom the whole stipulated freight money was duly paid; and that all extraordinary wages, expenses, damage and losses of every kind incurred by the detention have been adjusted and paid, as a general average on vessel, cargo and freight. But the assurers refuse to pay a partial loss on the freight arising from the protraction of a voyage by the capture and detention, which in this action is claimed by the plaintiff.

After fully considering the subject we are satisfied that the plaintiff's claim is not well founded. He insured his freight and he has received it; and all the general average the vessel and freight were liable to pay. But he says that if there had been no detention, his vessel might have earned her freight, in less time. But the underwriters did not insure any particular time, in which the voyage should be performed; but only that the freight should be earned. They are not therefore answerable for a partial loss arising from the increased length of the voyage by the detention, any more than they

would have been, if the arrival of the vessel had been delayed by violent storms, which had driven her out of her course. If the plaintiff can claim on his policy on the freight, it must be either for a partial loss, or for a general average. There has been no partial loss, and the general average has been paid him.

Mayo *vs.* Maine Fire and Marine Insurance Company

Verdict set aside.

The solicitor general and *Hopkins* for the plaintiff.
Mellen and *Longfellow* for the defendants.

MOSES WOODWARD, PETITIONER FOR A REVIEW,
versus
JOHN SKOLFIELD.

THE original action was *assumpsit*. The petition was filed, and notice to the adverse party ordered, at the last term. Since which time the petitioner has died. And now *Mellen*, who was of counsel for the petitioner, suggests his death and moves for his executors to be admitted to prosecute the petition.

A petition for a review abates by the death of the petitioner pending the petition; and his executor cannot be admitted to prosecute it.

By the court. The statute of 1783, c. 32. § 10. does not extend to this case. The petition abates by the death of the petitioner.

ROBERT WINSLOW, AN INFANT WHO SUES BY HIS GUARDIAN, &c. PLAINTIFF IN ERROR,

versus

ROBERT ANDERSON.

The only fines to which a non-commissioned officer or private soldier in the militia is liable for default of appearance are four dollars if the default be at a regimental or battalion muster, and two dollars at a company muster.—An infant may be sued for non-appearance at a military muster, and may answer personally as in case of an indictment.

THIS was a writ of error brought to reverse a judgment of a justice of the peace, imposing a fine of five dollars thirty three cents, upon the plaintiff in error, for his non-appearance at a muster of a military company, to which he belonged.

The error assigned is, that at the time of rendering the said judgment, the plaintiff in error was an infant and under the age of twenty one years; and the same judgment was rendered against him by default, without his having any guardian appointed, as by law he ought to have had.

The writ of error was brought at the last May term, and was continued to this term, and now the opinion of the court was delivered by

PARSONS, C. J. This case comes before us by a writ of error sued by the guardian of *Robert Winslow* against *Robert Anderson*, clerk of a military company, to correct the errors of certain proceedings had before a justice of the peace, in which the plaintiff in error was convicted of an offence, in neglecting to appear, armed and equipped according to law, at a company muster after due notice. And error in fact is assigned, that the plaintiff in error was an infant, and did not appear by guardian, but was convicted on default, to which assignment there is a demurrer.

On inspecting the record, it appears that a writ of error does not lie in this case; but the record ought to have been certified on *certiorari* granted on motion to the court. As this mistake has been frequent, the court have sometimes proceeded to correct the errors as on *certiorari*, where it appeared that a *certiorari* would have been granted on motion. But if the mistake be continued, we shall be obliged to quash the writ of error, as having improperly issued, in order to introduce a necessary regularity into practice.

In the present case we shall consider the record, as if it was certified to us on a writ of *certiorari*; and therefore we

Winslow vs. Anderson, in error.

cannot take any notice of the error in fact, assigned and not appearing on the record, as having any influence on our opinion.

It appears that the justice imposed a fine of five dollars and thirty-three cents for the neglect of appearance at a company muster or review. By the sixth section of the statute of 1805, c. 114. a penalty is imposed of four dollars for every default of appearance, armed and equipped at a battalion or regimental muster; and of two dollars for the like default at a company muster. These penalties are imposed in lieu of the fines provided in the nineteenth, twentieth, and twenty fourth sections of the statute of 1793, c. 14. No other forfeiture can now be incurred. And these penalties are forfeited, notwithstanding the arms and equipments of the soldier are on the parade, if he be absent; or if he is present without his arms und equipments. The justice has therefore mistaken the penalty, and on this account the proceedings must be quashed. We have had this question before us in the cases of *Savage* vs. *Gulliver*, and *Pratt* vs. *Hall*(1) in *Suffolk*, and the whole court, after full consideration, were of the opinion which we now declare.

Although we have taken no notice of the alleged infancy of the plaintiff in error in forming our opinion, yet as a part of the militia are minors, and the settlement of the question may prevent frequent disputes, we have considered the validity of that error as before us, and we are all of opinion that the proceedings are not erroneous for that cause.

The proceeding against the infant are not *civiliter*, as upon a contract, or *quasi ex contractu*, but *criminaliter* for an offence against law; and in these proceedings he may appear and answer in person, for the same reason that to an indictment for an offence against an infant, he may personally answer. If the law were otherwise no proceedings could be had against infants, having no guardian appointed by the probate court, to recover penalties for offences committed by them; for in those cases a justice is not authorized by law to assign guardians to them. *Let the proceedings be quashed.*

Whitman and *Longfellow* for the plaintiff in error.

Mellen for the defendant in error.

(1) *Vide Ante Pages* 239. 171.

PELATIAH HUSSEY, PLAINTIFF IN ERROR,
versus
JOHN LORD.

Military fines.

THIS was a writ of error brought to reverse a judgment of a justice of the peace, similar to that in the last case, the justice having imposed a fine of five dollars thirty three cents for neglect of appearance, armed and equipped according to law at a company muster; and for that cause the proceedings were quashed.

Whitman and *Longfellow* for the plaintiff in error.

Hopkins for the defendant in error.

JOHN M'MILLAN *versus* PHILIP EASTMAN.

The remedy against a public officer for neglect or misbehaviour may be by an action of the case alleging his misdemeanor, or by an action of debt, according to the nature of the misfeazance, but never by *assumpsit* as on an implied promise to do his duty.

THIS was an action of the case on *assumpsit*. The declaration contained four counts. The first was not relied upon by the plaintiff. The second alleges that the defendant, being collector of the direct tax in and for the fifteenth district of the second division of *Massachusetts*, on the fifth day of August, 1801, by his receipt of that date in writing under his hand, acknowledged that he had received of the plaintiff sundry sums of money [*which are specified*] for the plaintiff's bids on certain lands taxed to sundry persons [*who are named*] which lands were sold by the defendant at public vendue to the plaintiff for the payment of the direct tax and costs on said lands: that the defendant by his said receipt promised to account with the plaintiff for the money so paid, as the law directs; meaning thereby that he, in his said capacity of collector, would at and after the expiration of two years from said vendue, on demand make and execute to the plaintiff good and sufficient deeds of the said lands, or of so much thereof as should not be redeemed within said two years, and pay to the plaintiff the money which should be paid for the redemption of any part thereof within the said two years: and that no part of the said lands were redeemed. Yet though

requested the defendant never has made and executed any deed or deeds of the said lands or any part thereof.

The third count is for money had and received.

The fourth count recites that the defendant held his vendue pursuant to a previous advertisement for the sale of the delinquent lands in his district, and offered the lands for sale on the following among other conditions, "that the person who "should pay the taxes and costs on any tract or parcel of land "for the least quantity of any such land, when offered for sale, 'should be considered as *the true purchaser, and be entitled "to a deed*, unless the same should be redeemed according "to law:" that the defendant sold sundry parcels for the taxes and costs [*specifying them*] and in consideration that the plaintiff, at his special request, promised to pay him the respective sums of money, and to perform all things on his part to be performed as a purchaser or bidder by virtue of said conditions to be performed, he being the best bidder, the defendant promised the plaintiff to sell the said lands to him, and to make and deliver a deed thereof after the expiration of two years from the sale, unless the owners should redeem them within that time: the plaintiff then avers that he paid the money, and performed all, which on his part was to be performed: that the defendant caused the said lands to be struck off to the plaintiff for the consideration aforesaid; and the plaintiff became the lawful purchaser thereof, and entitled to a deed of the same: that the lands were then of the value of, &c. that the plaintiff has been ever ready to receive a deed, and on such a day after the expiration of the two years, and at divers other times demanded it. Yet the defendant has never made or delivered such deed, but refuses so to do.

The cause was tried before *Thatcher, J.* upon the general issue, October term, 1805.

At the trial the plaintiff offered in evidence, 1. The defendant's receipt for the monies paid by the plaintiff for the lands which were sold to the plaintiff concluding thus, "*which I am to account for as the law directs.*" 2. The articles or conditions of the public sale, which agreed with the description of them in the declaration. The judge rejected said evi-

M'Millan vs. Eastman.

dence as inadmissible to support the plaintiff's declaration, and he directed the jury to find a verdict for the defendant; and further that an action upon *assumpsit* would not lie upon the facts stated in the declaration. The jury found a verdict according to the directions of the judge. The plaintiff filed his exceptions to the opinions and directions of the judge, and moved for a new trial for the supposed misdirection.

This motion was argued at the last may term in this county, by *Emery* for the plaintiff, and *Mellen* for the defendant.

Emery relied on the two papers produced at the trial as parts of one transaction, and as amounting to a contract in writing on the part of the defendant, and so not within the statute of frauds; and he contended that by the United States' statute of July 14, 1798, § 13, it was made the duty of the collector to give the deed contemplated, in case the land should not be redeemed within the limited time; and so far this statute might be considered as repealing the statute of frauds as applied to this transaction.

Mellen perceiving the court inclined for the defendant, asked leave merely to suggest the points he had intended to urge. 1. That *assumpsit* will not lie against a collector, in that capacity, for his non-performance of certain official acts (1). 2. The promise is void by the statute of frauds. The promise must be considered as made in behalf of the United States. 3. But if made for the defendant himself, it is void for want of consideration. 4. The collector is not authorized by law to give the deed (2). No person can convey the land of another without express power delegated to him. 5. The action, if it lies at all lies in the courts of the United States, and the courts of the state have no jurisdiction of it.

The cause stood continued for advisement, and at this term the opinion of the court was delivered by

PARSONS, C. J. An act of the *United States* was passed July 14, 1798, to lay and collect a direct tax, to be assessed on dwelling houses, lands and slaves, agreeably to an act before passed providing for a valuation of dwelling houses and lands, and for the enumeration of slaves. By the 4th section

(1) 3 *Black. Comm.* 165.
(2) *Vide U. S. Laws, vol.* 216, *vol.* 5. 145, *vol.* 6. 53.

the supervisors were to subdivide their districts into collection districts, and within each of them to appoint a collector. By the 6th section, each collector was to be furnished with a list of the assessments within his collection district, and by the 9th section, he was authorized to demand and collect the taxes committed to him, by giving the public notice, and by proceeding as therein directed. By the 11th and 12th sections, when the person, under whose care and superintendance the estate assessed was situated, or found, was not in his collection district, he was required to certify the same to the surveyor of the assessment district, within which such person resided, if known, and the surveyor was to cause notifications to be made, and such person might pay his tax within the collection district in which he resided. By the 13th section, which is principally relied upon by the plaintiff, the collector is authorized, after giving the notice there required, and the taxes remaining unpaid for a year, to sell at public auction so much of the land, as might be necessary to pay the taxes, with the costs and charges of sale. And there is a proviso, that the owner may redeem, by paying to the collector, for the use of the purchaser, within two years, the amount of the taxes, costs and charges, with twelve per cent. interest, on which payment, or the tender thereof, the sale shall be void. And no deed shall be given, in pursuance of such sale, until the time of redemption shall have expired. By the 14th section, the collector is obliged to account, and pay over monthly the monies he shall have collected.

In this action the *gravamen* complained of by the plaintiff is substantially thus stated. That the defendant was the collector of the fifteenth collection district in the second division of *Massachusetts:* that the lands described in his writ were situate, and legally assessed in his district; that for default of payment of the taxes, the defendant duly advertised the lands for sale at public auction; that they were sold to the plaintiff, the highest bidder, for 23 dollars, 68 cents, being the amount of the taxes, with the costs and charges of sale: that the owner did not redeem them within two years: that after the expiration of the two years the plaintiff demanded a deed of conveyance of the defendant, who refused to execute any deed, and for this refusal he brings his action.

M'Millan *vs.* Eastman.

The declaration contains four counts, of which we lay aside the first, as the plaintiff does not rely upon it. Of the three last, two, the second and fourth, alledge a promise of the defendant, in consideration of the sale at auction to the plaintiff, and of his payment of the money, to execute to him a deed of conveyance of the lands sold. To prove the promise, the plaintiff produces the conditions of the sale under the hand of the defendant; but in these conditions there is no intimation that the defendant would execute any deed to the purchaser after the expiration of two years, if not before that time redeemed. He also produced the defendant's receipt for the money paid by the plaintiff for the taxes on the land struck off to him, with the charges, for which the defendant is to account as the law directs. Neither is there in this receipt any promise of the defendant to execute any deed conveying the land. And by the 14th section of the statute he was obliged, within one month, to account for, and to pay over the money. The papers offered had therefore no legal tendency to prove an express promise of the defendant to execute any deed of conveyance of the land struck off to the plaintiff.

But his counsel insist that those papers would have proved facts, whence the law would imply a promise of the defendant to execute such a conveyance. This appears to us to be a mistake. We know of no decision that, in any case, the law will imply a promise to convey land, on which an *assumpsit* can be maintained at law. And it is very certain that no such action can be maintained since the statute of frauds has required a memorandum in writing of the party charged with the contract or agreement to convey land, for the breach of which he is sued. The argument to support the inference of an implied contract is founded on the position, that it was the collector's duty to have made the conveyance, and that the law implies a promise of every man, that he will do his duty. If the position was right, that it was the collector's duty to have made the conveyance, the inference would not be in this case just. For the remedy against a public officer for neglect or misbehaviour in executing his office, is generally by an action of the case, alleging his misdemeanour, or sometimes by an action of debt, according to the nature of the misfeazance, but not by an *assumpsit*, as implied by law.

The plaintiff's third count is for money had and received. And we do not see how the evidence rejected could, in any manner, have tended to support this count. The money was not paid by mistake, or on a consideration which had failed, or obtained by deceit or imposition, or detained by the defendant against good conscience. He received the money in trust for the *United States* in the due course of his official duty, and to them he either has accounted, or must account.

If the plaintiff had sued a special action of the case against the defendant for a misfeazance in his office, in not executing the conveyance when requested, we must then have determined whether his neglect was a breach of his duty. At common law a title to land by purchase must be conveyed by deed ; but by statute a title may be acquired without deed. In the present case whether the title of the plaintiff wan complete by his purchase at auction without deed, or whether a subsequent deed was necessary, or whether, if it was, the defendant ought to have executed it, are questions, which must depend on the construction of the several statutes of the *United States* on this subject : particularly on the 13th section of the statute of July 14th, 1798, the 5th, section of the statute of March 16th, 1802, and the 5th section of the statute of March 3d, 1804. On these questions we give no opinion. As we are satisfied that the evidence offered upon the trial was properly rejected, and that the direction of the judge was right.

Judgment must be entered according to the verdict.

THE INHABITANTS OF WINDHAM

versus

THE INHABITANTS OF PORTLAND. 16 Mass. 76

A seizin of a freehold estate in right of his wife is sufficient to give one a settlement under statute of 1789, c. 14.

No settlement could be gained in any town under that statute by residence and payment of taxes for five years the statute not having continued so long in force.

Before the statute of 1793, c. 34. when a new town was formed of part of an existing one, the settlement of persons absent at the time of the incorporation of the new town continued in the old town, though their former dwelling was in that part, of which such new town is formed.

THIS was *assumpsit* for the support of a pauper, and came before the court upon the following agreed statement of facts.

"It is agreed by the parties that *Matthew Tobin*, the person mentioned in the declaration, is a native of *Ireland*, and came to that part of *Falmouth* now called *Portland*, in the year 1754, and resided there until 1761, when he removed to *Penobscot*, a place then unincorporated, and there resided until the year 1776, at which time he removed to *Windham*, and has resided there ever since, excepting the years 1803 and 1804, when he was absent at *Penobscot*. He was duly taxed in *Windham*, and has paid all state, town, and county taxes in that town from 1780 to 1794 inclusive, exceptin the years 1782 and 1783. The taxes for the year 1789 were not asssessed until after the 23d day of June in that year. In the year 1787, said *Tobin* was legally married to a Mrs. *Winship*, who is still living, and was then and still is entitled to dower in forty acres of land, with a house and barn thereon, situate in said *Windham*, and said *Tobin* and his wife lived upon twenty of the said forty acres of land, and actually improved the same from 1788 to 1794; and said forty acres were, during the whole of that time, of the clear annual income of thirty-three dollars, and the one third thereof was, during the whole of that time, of the clear annual income of eleven dollars.

"If the court are of opinion, upon this statement of facts, that the said *Matthew Tobin* has now a legal habitancy or settlement in the town of *Portland*, the defendants agree to be defaulted, and that judgment shall be rendered against them for the sum of 122 dollars 50 cents damages: otherwise the plaintiffs agree to become nonsuit."

Potter, for the plaintiffs, observed that by the facts in the case it was very clear that this pauper, by residing a year in

the town of *Falmouth*, without being warned to depart, previously to the year 1767, gained a settlement in that town. And he contended that nothing in the case shewed him to have acquired a settlement elewhere since that period.

The act incorporating *Portland* [1786, c. 14.] provides that if any person or persons theretofore belonging to *Falmouth*, and at that time removed thence, shall thereafter become a public charge, the same shall be paid by the two towns aforesaid, in proportion to the tax laid on them severally from time to time.

By the general statute for ascertaining what shall constitute a legal settlement in any town, &c. [1793, c. 34. § 2. art. 10.] it is provided that "upon division of towns or districts, every person having a legal settlement therein, but being removed therefrom at the time of such division, and not having gained a legal settlement elsewhere, shall have his legal settlement in that town or district wherein his former dwelling place or home shall happen to fall upon such division."

It is contended that by this statute, posterior in date to that by which *Portland* was incorporated, and general in its provisions, the settlement of this pauper was *ipso facto* changed, and that in virtue of it, he has become chargeable to *Portland* exclusively.

Longfellow, for the defendants, contended that this pauper had acquired a settlement in *Windham* under the statute of 1789, c. 14.

First, by being seized of a freehold estate therein of the annual income of three pounds, and residing upon it, and occupying it in person for two years together. *Tobin*, the pauper, was seized of such an estate in right of his wife; and the statute does not require the seizin to be in the person's own right.

If it be objected that the case does not shew that the dower was ever legally assigned to this widow, we answer that it shews what is equivalent to an assignment, *viz.* a quiet possession, and a receipt of the rents and profits, from which the assent of the heir must be presumed. If she was not in possession as tenant in dower, she must have been a trespasser, which the court will not presume.

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Secondly. The case finds that this pauper paid taxes for five successive years in *Windham*, which is another method of acquiring a settlement under the statute of 1789.

But if this person never gained a legal settlement in *Windham*, still the defendants contend that the plaintiff's remedy is against the town of *Falmouth*, who may have their remedy over against *Portland*, for a contribution under the act incorporating this latter town.

Whitman, in reply, observed that the act of 1789, being repealed before five years had expired from the passing of it, the pauper acquired no settlement by paying taxes in *Windham*. As to the two years residence and occupying a freehold estate, he contended that the case does not shew that this woman was ever tenant of the freehold. She had a title to dower, but until its assignment she could not be said to be seized or possessed of it: nor did a seizin in her right give to her husband a settlement.

The objection that this action ought to have been brought against *Falmouth*, and not against *Portland*, if founded, ought to have been made in abatement. But the towns are both liable. Perhaps the best construction would be that *Falmouth* is liable in the first instance for those paupers whose former dwelling place fell in that part of the original town, and *Portland* for those whose dwelling place fell within the limits of this latter town.

The opinion of the court was afterwards delivered by

PARSONS, C. J. We are to decide upon the facts stated, whether the settlement of *Matthew Tobin*, the pauper, be or be not in *Portland*.

The pauper came to *Falmouth* in 1754, and dwelt there until 1761, without being warned to remove from that town. He therefore had a legal settlement in that town. He afterwards removed to *Penobscot*, where he lived until 1776: but *Penobscot* being a plantation unincorporated, he did not lose his settlement in *Falmouth*. In 1776 he removed to *Windham*, and has lived there ever since, except the years 1783 and 1784, when he was absent at *Penobscot*. And the defendants have argued that he gained a settlement in *Windham*.

By the statute of 1789, c. 14. passsed on the 23d of June in that year, every citizen, who shall be seized of an estste of freehold in any town of the clear annual income of three pounds, and shall reside thereon, or live within the said town, occupying and improving the same in person for the space of two whole years, shall gain a settlement in that town. And the case states that in 1787, the pauper married a Mrs. *Winship*, who is still living, and who was, and still is, entitled to dower in a house and forty acres of land in *Windham*, the clear yearly income of one third of which is 11 dollars: and that the pauper and his wife entered on twenty acres, part of the land, in 1788, and actually improved the same for more than two whole years from that time. But it is not stated that her dower had been assigned to her.

If the wife had a freehold, the husband must have been seized, not in his own, but in her right. And the plaintiffs deny that a freehold, holden by the pauper in right of his wife, is such a freehold as is within the statute. On considering this point, we are satisfied that a freehold in right of the wife is within the statute. The husband is in fact seized of it, and is entitled to all the rents and profits: and the statute does not require that the freehold should be holden by the pauper in his own right.

The constitution, describing the freehold qualifications of a governor, senator or representative, declares that the freehold must be holden in his own right. But in describing the freehold qualifications of an elector, the restriction confining it to his own right is omitted: and a citizen, having in right of his wife a freehold of the annual value of three pounds is a qualified voter.

Comparing the freehold qualifications of an elector with the freehold of a citizen, by which he may gain a settlement, we are satisfied that no distinction is made: and that every citizen having a freehold qualification as an elector, and personally occupying it for two successive years, may gain a settlement.

The plaintiffs further object that from the facts stated the wife had no freehold in the land occupied, although she was entitled to dower. This objection, we think is well supported

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A widow, having a right of dower, cannot lawfully enter after her husband's death, until an assignment be made by the heir, or other tenant of the freehold, or in a course of legal proceedings. When the assignment is made, she acquires no new freehold, but is in by her husband, her seizin being deemed in law to be a continuation of her husband's seizin. As the entry of the husband and wife is not stated to be a disseizin of the tenant of the freehold, they must be considered as holding at his will, and not as having a freehold estate in her right. There seems to be here another defect in the statement. For although it be agreed that the yearly income of one third of the house and land was 11 dollars, yet the yearly income of the twenty acres occupied by the wife might be much less.

Another ground has been taken by the defendants, to shew that the settlement of the pauper was in *Windham*. The statute of 1789, provides that if a citizen, after the age of twenty-one years, shall reside and pay a town tax in any town for the space of five years successively, he shall gain a settlement in that town. And the case states that the pauper resided in *Windham*, and paid town taxes there for the year 1789, and for four successive years after. The statute of 1789 was repealed by the statute of 1793, c. 34. passed Feb, 11th, 1794. This last statute enacts that all settlements then gained should remain, until lost by acquiring other settlements pursuant to the provisions there directed. If a settlement had been gained under the statute of 1789, before its repeal, the objection of the defendants must have prevailed. This statute requires, not only a payment of town taxes in any town for five successive years, but a residence for that time in the town. The statute of 1789, passed June 23d in that year, and it was repealed February 11th, 1794, not having been in force five years. The pauper could not therefore reside in *Windham* under that statute five years successively; and this objection of the defendants must fail. And upon the whole case sufficient does not appear to shew that the pauper was ever settled in *Windham*.

The plaintiffs, to maintain their action, must also establish the pauper's settlement in *Portland*. *Portland* was formerly

a part of *Falmouth*, and was incorporated by statute of 1786. c. 14. and the pauper, when he had his settlement in *Falmouth*, resided in that part of it since included in the limits of *Portland*. Hence the plaintiffs infer that the settlement of the pauper is in *Portland*. If the legality of this inference depended upon the construction of the statute of 1793, the plaintiffs must recover. By this statute it is enacted, that upon the division of towns or districts, every person having a legal settlement therein, but being removed therefrom at the time of the division, and not having gained a settlement elsewhere, shall have his settlement in that town or district, wherein his former dwelling place or home shall happen to fall upon such division. But this provision relates only to divisions made after the passing of the act. *Portland* was incorporated before the passing of this act; and the question in this case must be decided according to the laws in force at that time.

A town incorporated may acquire property, real or personal; it enjoys corporate rights and privileges, and is subject to obligations and duties. If a part of its territory and inhabitants are separated from it, by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation. Thus it would continue seized of all its lands, possessed of all its personal property, entitled to all its rights of action, bound by all its contracts, and subject to all its duties. Any person having a settlement in the town by residence, or in any other manner, on whatever part of its territory he might have dwelt, when a pauper, has a claim upon it for relief; and although the pauper may not enforce his claim by action, yet if relief be refused by the town, and supplied by the humanity of others, the town may be compelled to refund the value of the supplies, in an action instituted for this purpose. A town therefore is justly considered as under a legal obligation to support every person having a settlement there, when he shall be poor and stand in need of relief, having no relatives obliged to maintain him. And by a

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separation of a part of its territory and inhabitants, by annexation or a new incorporation, this obligation remains unaltered.

But as this separation must be made by the legislature, the act authorizing it may impose conditions or limitations, to relieve the town, which is so to be deprived of a part of its territory or inhabitants; and provisions of this nature are very frequently, although not always, introduced into acts incorporating a new town, composed of the fragments of one or more old towns. But if no legislative provision be made, the settlement of any person in the old town is not affected by the new incorporation, unless at the time of the incorporation he shall dwell within the limits of it, and as a party to it acquire a new settlement in the new town.

This principle, thus deduced from the nature of corporate rights and duties, has been frequently recognized by the legislature, when passing acts incorporating new towns out of one or more old towns. We refer to the acts incorporating *Newburyport* [3 & 4 G. 3. c. 9.] *Cohasset* [10 G. 3. c. 7.] *West Springfield* [14 G. 3. c. 12.] *Ludlow* [14 G. 3. c. 1.] *Milford* [1780, April 11.] *Westport* [1787, c. 9,] *Freeport* [1788, c. 62.] *Russell* [1791, c. 39,] and other towns: and also to the act incorporating the defendants. The provision in this last act is that if any person or persons heretofore belonging to the town of *Falmouth*, and who have removed from thence, *shall be returned thither again*, and become a public charge, the same shall be paid by the two towns aforesaid, in proportion to the tax laid on them severally from time to time. Now a pauper cannot be returned to any town, but to that in which he has a settlement: and this act contemplates that all persons having a settlement in *Falmouth*, and then removed therefrom, may be returned thither again and relief is given to *Falmouth*, by enabling it to charge *Portland* with a proportion of the expenses.

It is therefore very clear, upon the whole state of the case, that the pauper, *Tobin*, has not his settlement in *Portland*, nor in *Windham*, but in *Falmouth*, and the plaintiffs cannot maintain their action. *Falmouth* should have been sued as the place of the pauper's legal settlement; which town might have called on *Portland* for contribution.

In this respect the law is now altered by the statute of 1793 as to incorporations made after that time; and the mistake in bringing the action might have arisen from the considering that statute as in that case an affirmance of the existing law.

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COMMONWEALTH *versus* JOSEPH DREW AND LEVI QUINBY.*

Of murder and manslaughter.

THE defendants were indicted at this term for the wilful murder of *Ebenezer Parker*. The indictment contained two counts.† The first count charged *Drew* and *Quinby* with assaulting *Parker* at *Falmouth* on the eleventh day of January last, then a deputy sheriff, and in the due execution of his office: and that *Drew* then and there gave the deceased the mortal wound, of which he thereafterwards, on the eighteenth of the same January died. And that *Quinby* was present, aiding and abbetting *Drew* in giving the mortal wound.

The *second* count was like the first, with this difference only that it was not alleged therein, that *Parker* was a deputy sheriff in the due execution of his office.

The prisoners on their arraignment, pleaded not guilty; and not agreeing in their challenges to the jurors, they were separately tried. *Drew* was first put on his trial.

It satisfactorily appeared in evidence, that, on the day alleged in the indictment, *Drew* gave the deceased a mortal wound with a bludgeon, by which *Parker's* skull was fractured: that the bludgeon was of hard wood, about four or five feet in length, and about two inches in diameter, having formerly been used as a handle to a pitchfork: and that *Parker* seven days afterwards, died of that wound.

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*The reporter was favoured by the *chief justice* with the report of this case.

† It was remarked by the chief justice that there seemed no occasion for two counts in this case, as murder was charged in both, and with a similar instrument: and that on the last count the solicitor general might have given evidence that the deceased was a deputy sheriff in the due execution of his office, to prove that the killing was malicious.

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it was proved that at the time the wound was given, and long before the deceased was, and had been a deputy sheriff, duly appointed and qualified to execute that office; that an execution, duly issued on a judgment legally recovered by one *Josiah Gould* against *Quinby*, had been sometime before the assault delivered to the deceased to be executed: that about a fortnight before the assault, the deceased had lawfully arrested *Quinby* on that execution, and had delivered him to one *Richard King* for safe keeping, who took charge of him: that without the knowledge of the deceased, *King*, at *Quinby's* request, permitted him to go at large, *Quinby* promising *King* that he would be ready to settle the execution, at any time when the deceased should call on him: that *Parker*, who lived at several miles distance from *Quinby's* place of residence came thither about a week afterwards to see *Quinby*, and procure satisfaction of the execution, but *Quinby* could not be found by him: that *Drew* and *Quinby* were hired men in the service of *Daniel Conant*, *Drew's* employment being at a blacksmith's forge of *Conant's*, and *Quinby's*, in working at *Conant's* saw-mill; but when the mill was not going, *Quinby* worked with *Drew* at the blacksmith's shop, which was at a distance from, and not part of, any dwelling house: that on the day when the mortal wound was given, the deceased again came to see *Quinby*, and, if he would not satisfy the execution to arrest his body: that *Quinby* knew that the deceased had come with that intent, and being at work in the saw-mill, and seeing the deceased coming to the mill, he left his work and went to *Conant's* house, there taking with him a bottle of rum, he passed out of *Conant's* back door, and went to the blacksmith's shop, where *Drew* was at work making nails, when *Drew* and *Quinby* fastened the shop, to exclude the entrance of any person, that in the evening the deceased, having been informed that *Quinby* had shut himself in the shop with *Drew*, sent one *William Babb*, jun. to the shop, to inform them that he was coming, and to advise *Quinby* to settle the execution: that *Babb* went, and finding the door fastened, knocked: *Quinby* called "who is there?" *Babb* then told his name. "who is with you?" asked *Quinby*: Upon *Babb's* answering, "no one," he was admitted into the shop, and the

door was again fastened : that *Babb* delivered his message from the deceased, advised *Quinby* to settle the execution, and told him that *Conant* was ready to settle it for him if he would consent ; but *Quinby* refused, and said it should not be settled that night : that the deceased then came to the shop with *Richard King*, *Samuel Cox* and some others to assist him and knocked at the door : *Drew* was drawing nails from a rod then in his hand, and *Quinby* was blowing the bellows, one hand being on the bellows pole, and the other resting on the bludgeon, with which the mortal wound was afterwards given : that when the deceased had knocked, *Drew* enquired who was there ? "*Parker*," answered the deceased : that *Drew* then threw some burning cinders towards the door from the nail rod in his hand : that *Parker* then asked for admission, and *Drew* asked him if he was well. "Yes," answered *Parker* : "then I advise you," said *Drew*, "to stay where you are :" that the deceased then told *Drew*, that he did not want *him*, that he wanted *Quinby*, who was his prisoner, and that he would have him : that the deceased then put his hands under the door, which was about four feet wide, and which opened outwards on a lane leading to *Conant's* house, and to his mills, and, without much apparent difficulty pulled it open : that *Drew* immediately threw down the nail rod, caught up a sledge, and came to the door : that he went out in a great passion, saying, "what are you breaking open my shop for? stand by, or I will throw the sledge through you:" that he then with the sledge struck at the deceased, who was without any weapon; and who dodged behind the door : that he then struck at *King*, who retreated from the sledge, and *Drew* threw it at him, and it glanced against his breast, and fell without hurting him: that *Quinby*, when *Drew* had left the shop with the sledge in his hand, threw down the bludgeon, he had held, towards the door, and it fell about two feet distant from it : that *Drew*, after throwing the sledge at *King*, returned to the shop door and saw the bludgeon lying there : that he reached in his hand and took the bludgeon, and turned to the deceased who had pushed the door partly forward, had come from behind it, and was standing against the edge of it, and struck at

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him three times with the bludgeon, holding it in both his hands, and striking with great violence: that the first blow fell on the edge of the door, and forcibly shut it; the second blow was on the head of the deceased, and inflicted the mortal wound; and the deceased when falling under the weight of it, received the third blow on his back or shoulders, it not being clearly ascertained on which; and one witness also testified that the first blow struck the head of the deceased: that *Drew* then turned to *King*, and with the bludgeon knocked him down, and immediately went into the shop, carrying the bludgeon with him, and there told *Babb* that he had better take *Parker* up as he had got enough of it: that *Babb* left the shop to take up the deceased, and *Drew* and *Quinby* again fastened the door, and, opening the window, defied the people who were outside; *Drew* saying, that as many might come as had a mind to, and he would give them all sore heads.

Upon this evidence, the counsel for the prisoner argued, that the offence was manslaughter, and not murder. That *Parker* having before arrested *Quinby* on the execution, and his servant having permitted him voluntarily to escape, he could not again lawfully arrest *Quinby* on the same execution; and therefore the deceased was a trespasser in breaking open the shop door, and his entry might lawfully be resisted by *Drew*, who was in possession of the shop. And they argued further that the deceased was killed in attempting unlawfully to arrest *Quinby*, by colour of a legal warrant: that the attempt was an unlawful act, that not only *Quinby*, but any stranger, might lawfully oppose the officer in his unlawful attempt, and *á fortiori* might *Drew*, as he could not be considered as a stranger, being a fellow servant with *Quinby*, working with him for *Conant* who had hired them to labour in his service: and if the officer was killed in pursuing his unlawful attempt, the killing was at most but manslaughter. And upon this point they cited, and relied on as authorities, *Sir Henry Ferrer's case Cro. Car.* 371.—*Hopkin Hugget's case*, 1. *Hale*, 465. and *Kel.* 59.—*Rex.* vs. *Tooley & al.* 2 *L. Raym.* 1296.—*Mary Adey's case*, 1 *Leach, C. C.* 245. 1 *East, C. L.* 329, *in the note.*

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The solicitor general for the commonwealth argued, that when the mortal wound was received, the deceased had not given to *Drew* any provocation, sufficient in law to reduce the homicide below the crime of murder. And he cited *Foster's C. L. Disc.* 2. *ch.* 8. § 10, 11, 12, 13, 14, and 1 *East's C. L.* 325. *ch.* 5. § 89.

The chief Justice charged the jury. After stating to them the evidence, he observed that, if they believed the witnesses, the deceased, when he received the mortal wound, was not in the execution of his office, as a deputy sheriff: that having arrested *Quinby* fourteen days before, and committed him to the custody of *King*, who had voluntarily permitted his prisoner to go at large, this permission must also be considered as the act of the deceased, whose servant *King* was. And that a voluntary escape of *Quinby* having been suffered, the deceased could not lawfully arrest him again on the same execution; and therefore that the prisoner ought to be acquitted of the felony and murder charged in the first count of the indictment.

In the second count, the prisoner was charged with murdering the deceased, then in the peace of GOD, and of the commonwealth, without any allegation, that he was in the execution of his office as a deputy sheriff: and the jury were instructed that it was their duty to consider the evidence, as it applied to this second count. If they believed the witnesses, there was no question, but that the deceased was killed by the prisoner at the bar. If they were satisfied of this fact, the implication of malice would arise, unless the circumstances of the killing were such, as would reduce the crime below murder. If the act of killing was in itself attended with probable dangerous consequences to the deceased, and was committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shewn: for the law infers that the natural or probable effects of any act deliberately done, were intended by the agent.

It had been argued that there were two causes of provocation which would reduce the killing below the crime of murder. One was that the prisoner was in the peaceable possession of his shop, engaged in his lawful business, when the deceased unlawfully forced open the door, with an intent to en-

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ter against the prisoner's consent. The other provocation was that the deceased forced the door, with the intent unlawfully to enter and to arrest *Quinby*, who was the prisoner's fellow servant, and at work with him, the deceased having no legal warrant therefor.

The chief justice then observed, that it was necessary for the jury, before they considered the nature and sufficiency of these provocations, to determine whether the bludgeon used by the prisoner, in killing the deceased, was, or was not a deadly weapon, which would necessarily kill, or do great bodily harm: that this was a question of fact, for the jury exclusively to decide. If the jury were satisfied that the weapon used was not likely to kill, or to do great bodily harm he was of opinion, that either of the provocations was sufficient to free the prisoner from the guilt of murder. For by using a weapon, which would not probably do great injury to the deceased, it was a reasonable inference that the prisoner did not intend to kill the deceased, but accidentally killed him against his intention, and the presumption of malice would be sufficiently rebutted; and without malice, the killing could not be murder. But if the jury were satisfied that the instrument of death was a deadly weapon, which would probably kill the deceased, or do him great bodily injury, these grounds of excuse or provocation would deserve a different consideration.—That the provocation arising from the trespass committed by the deceased, in breaking open the shop-door, for the purpose of unlawfully entering, was not a provocation sufficient to reduce the killing below the crime of murder, if the prisoner killed the deceased with a deadly weapon; because the trespass was not a sufficient excuse for such a barbarous act, admitting the prisoner, and not *Conant* his master, to have had possession of the shop. For it is a rule of law that where the trespass is barely against the property of another, not his dwelling house, it is not a provocation sufficient to warrant the owner in using a deadly weapon: and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation: but if the beating be with an instrument, and in a manner not likely to kill, and the trespasser should not-

withstanding happen to be killed, it will be no more than manslaughter.

The other provocation, which it was argued, would reduce the killing below murder, was the forcibly breaking of the shop-door by the deceased, with the intent unlawfully to enter and to arrest *Quinby*. It was a principle of the law, that if any man under colour or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and if he resist and in the resistance kill the aggressor it will be manslaughter: and that any person aiding the injured party by endeavouring to rescue him, or to prevent an unlawful arrest when actually attempted, is guilty only of manslaughter, if he kill the aggressor in opposing him, unless perhaps, the party aiding be a stranger to him, whom he shall endeavour to assist.—That whether the principle will or will not comprehend a stranger, it was not necessary then to decide, for it was the opinion of the judges then present, that in this case the prisoner was not to be considered as a stranger to *Quinby*, as they were fellow servants, hired by the same master, and were at that time labouring together in his service.

Although from the testimony of the witness (if the jury credited him) it appeared, that on the door being broken open the prisoner rushed out with his sledge, saying, "what are you breaking open my shop for—stand by, or I will throw the sledge through you," whence it may be inferred, that the fatal blow was given to chastise the deceased for the violence done to his shop; yet the jury would decide, whether it must not be reasonably presumed, that the intent of the prisoner was also to prevent the deceased from entering the shop to arrest *Quinby*, as the door had been fastened for his protection, and as the deceased had just before declared, that he was his prisoner, and that he would have him.—That in this view of the evidence the jury would apply the facts to the law.

In three of the cases relied on for the prisoner, the unlawful arrest had been made before there was any resistance or quarrel. And in the last case, the officer and his assistant, before the latter was assaulted, were in the room with the party to be arrested, had him in their power, and had ordered him to go with them. In the case of the prisoner, *Quinby*

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had remained all the time in the shop, and the deceased had not entered it, but when the prisoner went out, had retreated behind the door, to avoid a blow from the sledge.—That before the mortal blow was given, a stroke with the bludgeon had forcibly shut the door; and that the deceased and the prisoner were out of the shop with the door closed, when the mortal wound was inflicted. If the jury were satisfied that the evidence established these facts, they would conclude that although the deceased had forced open the door, with the intent to enter the shop, to arrest, or to attempt the arrest of *Quinby;* yet when he received his death wound, he had not arrested *Quinby*, nor had he, in fact, attempted or offered to arrest him.

The chief justice concluded by observing that he had considered the evidence in a light as favourable to the prisoner as was consistent with the testimony of the witnesses; and it was with regret, that he was obliged to declare, that if the facts were as he had stated them, of which the jury were the judges, the killing of the deceased by the prisoner, if the instrument was a deadly weapon, amounted to the crime of murder.

The jury acquitted the prisoner on the first count, and found him guilty of the felony and murder charged in the second count.

Quinby was afterwards put upon his trial, and the same evidence was given against him, which had been produced against *Drew*. It was further proved in behalf of the commonwealth, that *Quinby*, before *Parker* had arrested him on the execution, had armed himself with a club, and had declared to one witness, that if *Parker* attempted to take him, he would break his head; and to another witness, that if *Parker* came to take him, and he bid him stand off, if *Parker* persisted he would split him down.—That after the mortal wound had been given, and *Drew* had again fastened himself in the shop, and let down the window, *Quinby* came to the window with a club, brandishing it in defiance.—That he called one of the people a rascal, for pretending to be his friend, when he came to assist in taking him.—And that *Quinby* or *Drew* said, "carry off your dead officer." And the same *William Babb* jun. who was in the shop, when the

deceased forced open the door, testified, that when the door was opened for himself, *Quinby* was standing within two feet of the door with the bludgeon in his hand:—that after he entered the door was hasped, and *Quinby* went to the bellows and shifting the bludgeon to his other hand, began blowing the bellows but he further swore, that when *Drew* went out of the shop with the sledge, *Quinby* did not remove from his place: that while standing by the bellows, he threw down the bludgeon, which fell between the anvil and the door, and about two feet from the door: that when he threw it down he said nothing: and that after *Drew* went out of the shop, *Quinby* could not see him, neither when he threw the sledge nor when *Quinby* threw down the bludgeon.

Upon this evidence, the *chief justice* left it to the jury, whether they would presume that *Quinby* threw the bludgeon towards the door, with the intent to furnish *Drew* with a deadly weapon, to assault the deceased outside of the shop. If they were satisfied that he threw the bludgeon with that intent, he was equally guilty with *Drew* who used it. But if they were not satisfied that the bludgeon was thrown with that intent, *Quinby* ought to be acquitted. And the jury found him not guilty.

On the last day of the term, *Drew* was brought up to receive his sentence, when his counsel moved the court to delay giving judgment, because they had evidence, that *Richard King*, who was a material witness for the government had declared before the trial, that he would hang the prisoner by his testimony, if he could, of which declaration he had no knowledge until after the trial:—and because a Mr. *Ingalls*, one of the jury, did not agree to find the prisoner guilty of murder, but only of manslaughter; and through mistake of his duty, he believed that he must assent to the verdict of the major part of the jury.

The court did not enquire into the truth of these allegations; observing that if they were proved, they could not avail the prisoner on any legal principles, by which alone the court must be bound: and if they supported any equitable claims to favour for the prisoner, he might apply to the supreme executive, who had power to cause the sentence to be

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executed, or who could pardon it absolutely, or on condition at its discretion.

Judgment of DEATH *was then pronounced against the prisoner.*

Holmes and *Emery* for the prisoner *Drew*.

Mellen and *Longfellow* for *Quinby*.

CORNELIUS DILLINGHAM *versus* THOMAS RUNNELS.

A special promise to pay a pre-existing debt is not within the statute of frauds, and may be proved by parole evidence, although the origin of such debt was the sale of land by the promisee to the promisor.

THE declaration was in case, "for that the said R. at &c. in consideration that the plaintiff would discount thirty one dollars out of a sum of money then and there due from said R. to the plaintiff for land before that time by the plaintiff sold and conveyed to the said R. to the amount of more than thirty one dollars, undertook and faithfully promised the plaintiff, provided he would take and receive of said R. a certain note of hand then and there in possession of said R. signed by one J. P. wherein and whereby the said J. P. promised to pay one M. R. or his order 30 dollars 38 cents on demand with interest; which said note was endorsed by said M. R. and would commence a suit thereon, that if said J. P. did not immediately upon the commencement of such suit pay said note, and the costs which should arise thereon, that he the said R. would well and truly, on demand, pay to the plaintiff the full contents of said note, with such costs as should by means of such suit accrue thereon. And the plaintiff avers that, relying on the promises and agreements of the said R. so by him made as aforesaid, he the said *Dillingham* then and there received said note of said R. and commenced a suit thereon, and prosecuted the same to final judgment and execution: and that the said J. P. never did pay the contents of asid note and the costs which arose thereon, or any part thereof; and that the contents of said note and the costs which accrued thereon amount to the sum of 62 dollars 58 cents: of all which the said R. at &c. had due notice, &c. There was also a count

for 49 dollars 99 cents, money had and received; and another for the like sum laid out and expended.

Upon the general issue pleaded and joined, there was a trial before *Thacher J.* at the last October term in this county, and a general verdict for the plaintiff for 75 dollars 10 cents.

Upon the trial, to prove the promise stated in the special count in the declaration, the plaintiff's counsel offered oral testimony. To this the counsel for the defendant objected, on the ground that the promise as stated was within the statute of frauds and perjuries, and could therefore be only proved by some memorandum in writing signed by the defendant or his agent; and that such testimony could not apply to either of the other counts, as it was admitted that the promises alleged in all the counts related to the same cause of action. The judge overruled the objection, and admitted the evidence. To this opinion of the judge the defendant filed his exception pursuant to the statute, and now moves for a new trial because the said evidence was admitted.

By the court. We are satisfied that in this case the admission by the judge of the parole evidence was right. *Runnels*, being justly indebted to *Dillingham*, made the contract declared on, to induce the plaintiff to take *J. P.'s* note towards the payment of the debt. It is very immaterial what was the origin of the debt due to the plaintiff, if it was a just debt, whether it accrued from the plaintiff's having therefore sold land to the defendant, or from any other lawful consideration. The defendant's promise cannot be considered within the statute of frauds, because the contract, on which he is charged, is not on the consideration of the sale of lands, or of any interest therein, but to pay a precedent existing debt.

As the court were about entering judgment according to the verdict, the defendant's counsel took an exception to the declaration, that it did not allege the discount to have been made by the plaintiff, which formed the consideration of the defendant's promise and undertaking. The verdict was then set aside by consent, and the defendant was afterwards defaulted on terms as to the costs.

E. Whitman for the plaintiff.

Mellen for the defendant.

HENRY LADD *versus* WILLIAM BLUNT.

Upon an issue of *nul tiel record* upon a judgment of the common pleas, this court does not direct the original record to be sent up, but receives copies attested by the clerk.

When goods sufficient to satisfy a judgment are seized on execution, the debtor is discharged, although the sheriff waste the goods, or misapply the money arising from the sale of them, or does not return the execution.—But if the execution be extended on the debtor's land, his title is not affected, until seizin is delivered to the creditor; and the title of the latter is not complete, until the return is made of the extent and delivery of seizin.

DEBT on a judgment in favour of the plaintiff against the defendant, rendered in the court of common pleas for this county, June term, 1801.—

The defendant pleads 1. *Nul tiel record,* on which issue is joined to the court. 2. In bar that the plaintiff sued out his writ of execution upon the said judgment and caused it to be levied on the defendant's land, in full satisfaction of the same, as by the officer's return on said execution may fully appear.

To the second plea the plaintiff replies, that "there is "no such record of the return on said execution of the levy "on real estate of said *Blunt* in satisfaction of the same as "he has alleged in said second plea, and this, &c. "Wherefore," &c.

To this replication the defendant demurs and the plaintiff joins in demurrer.

Upon the plaintiff's producing a copy of the record of the judgment, the defendant relinquished his defence under the first plea: and the question on the demurrer was submitted without argument.

The opinion of the court was delivered to the following effect by

PARSONS, C. J. The action is debt on a judgment. The defendant has pleaded two pleas.

His first plea is *nul tiel record* of the judgment, on which issue is joined to the court. On inspecting an attested copy of the record, we are satisfied that there is such a record. We never direct the record of the court of common pleas to be sent us on the trial of an issue of *nul tiel record;* but receive copies of their records attested by the clerk in evidence, which by immemorial usage is held to be evidence of the record. Indeed upon a writ of error or *certiorari* nothing but the tenor of the record is sent up: which is only a copy attested by the clerk.

The *second* plea is, that the judgment has been satisfied by the extent of an execution issued upon it upon the lands of the defendant. The plaintiff replies that there is no record of the return of any such extent. To this replication there is a demurrer and joinder : and we are to decide on the sufficiency of the replication.

When goods sufficient to satisfy the judgment are seized on a *fieri facias*, the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return his execution. For by a lawful seizure the debtor has lost his property in the goods. But the law is different in the case of an extent on lands.

By our statute we have but one form of an execution, which includes a *capias ad satisfaciendum*, a *levari facias* as to the money of the debtor, and an *extendi facias* as to his lands. But the lands of the debtor cannot be taken unless by the acceptance of the creditor, to whom seizin must be delivered by the sheriff: and until this delivery of seizin the title of the debtor is not affected. The creditor's title is by matter of record : and unless he can shew it by a record, the debtor will hold the land. The sheriff must therefore return the extent and the delivery of seizin : which return, when made, is a record of the court, and as such can be pleaded. If there be no record of any such return, the creditor has no legal title to the land ; which remains the property of the debtor, and the judgment is unsatisfied.

To prevent frauds against others, the statute 1783, c. 57. directs the execution and return to be entered on the records of the county in three months after the extent. When therefore a debtor pleads satisfaction of a judgment by the extent of the execution on his lands, he must plead that the extent was legally made, seizin delivered, and a return of the execution and extent, which is a matter of record. For the lands remain the debtor's, unless the creditor has a good title to them by matter of record.

For these reasons the replication is good, which alleges that the plaintiff has no title to the lands by any record of the return, which is confessed by the demurrer.

Mellen for the plaintiff.

Potter for the defendant.

EZRA HYDE.

versus

THOMAS CROSS, TRUSTEE OF PATTEN AND WATERMAN.

Chattels are conveyed by a debtor to his creditor with authority to sell them for cash, if the debt was not paid at a stipulated time: He sells them for promissory notes payable at a future day, and sells the notes for cash at a discount. He shall account only for the cash actually received by him.

THIS was a *scire facias* to shew cause wherefore the plaintiff should not have execution against *Cross* as for his own proper debt to satisfy the judgment recovered by the plaintiff in the original suit against the principal debtors.

From the disclosure of *Cross* upon the *scire facias*, he not having submitted to an examination in the original action, it appeared that *Patten* and *Waterman*, being his debtors for certain supplies furnished by him for their ship *Orion*, had made to him a bill of sale of the ship, with authority to sell the same for cash, if his debt was not paid at a stipulated time: and that he had afterwards, and since the service of the original writ in this case upon him, sold the said ship for the benefit of said *Patten* and *Waterman* for promissory notes payable in sixty and ninety days, which notes he also sold at a discount of one and an half per cent. per month, the said discount amounting, on the whole of said notes, to the sum of 213 dollars, 25 cents, and that, after deducting the debt due to him for the articles aforesaid, and also a commission or brokerage of one per cent. on the sale of said ship, a balance of 575 dollars and 97 cents remained in his hands subject to the order of law.

The question for the decision of the court, which was submitted without argument, was whether *Cross* had authority to sell the said notes at a discount, in the manner disclosed by him, after he had been summoned as trustee in this case, and whether he should now be adjudged the trustee of *Patten* and *Waterman* for the amount of that discount in addition to the balance acknowledged by him, or for the amount of that balance only.

By the court. Let judgment be entered for the sum of 575 dollars, 97 cents.

E. Whitman for the plaintiff.

Pope for the defendant.

BATCHELDER HUSSEY & AL.

versus

THOMAS G. THORNTON & AL.

If A. contracts to sell certain goods to B. on a credit, with condition that B. shall furnish a surety for the price, and delivers the goods without such surety furnished, but declaring that he should not consider them as sold until the security should be given, the property remains in A. notwithstanding the delivery.

REPLEVIN for seventy seven boxes of candles, which the defendants, as officers, had attached as the property of *Todd* and *Worthley* at the suit of certain of their creditors.

Upon trial at the last October term in this county, before *Thatcher, J.* it was agreed that the demands of the said attaching creditors were just, and existed before the making the aftermentioned contract between the plaintiffs and the said *Todd* and *Worthley*. It appeared in evidence that in the month of February 1807, the plaintiffs then being the undisputed owners of the said candles, agreed to sell them to *Todd* and *Worthley* on credit at a price fixed on by them; but doubting their responsibility said they would not deliver them the candles without having an endorser or security. A short time after this conversation or contract, captain *Howard*, master of the said *Todd* and *Worthley's* vessel then lying in *Portland*, on board of which the said candles were intended to be laden, called at the plaintiffs' store in said *Portland* and enquired if said *Todd* and *Worthley* had any candles there designed to be put on board said vessel, and being answered in the affirmative, and told that they were ready whenever he wanted them, said he should send for them immediately. He accordingly sent a drayman, to whom the plaintiffs delivered the candles, and who carried them to the wharf by the side of said vessel. The plaintiffs said nothing to *Howard*, when he was at the store, nor to the drayman when he took the candles, respecting any condition attached to the contract.

After the candles had been carried to the wharf, and a part of them received on board the vessel, *N. Winslow*, one of the plaintiffs, came upon the wharf and informed capt. *Howard*, that he should not let the candles be put on board the vessel, unless he had an endorser or security. Upon the captain's answering that he had no concern in that particular, but presumed that an endorser would be furnished, *Winslow* said that he would deliver the candles, but that he should consider them as the property of himself and his

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partner, until they should have security. He then left the wharf, and the candles were afterwards laden on board the vessel. About four days after this transaction they were attached by the defendants as the property of *Todd* and *Worthley*. There was no evidence that the defendants knew any of the preceding circumstances relative to the contract for, and delivery of the candles. There was some evidence tending to shew a confession of the plaintiffs that they had obtained security for the candles previously to their delivery.

Upon this evidence the judge directed the jury that if they believed the plaintiffs to have obtained security before the delivery of the candles, the verdict ought to be for the defendants: but if they did not find that fact, then the plaintiffs were entitled to a verdict in their favour.

A verdict being accordingly found for the plaintiffs, the counsel for the defendants filed exceptions to the said direction of the judge, and moved for a new trial on the ground of those exceptions; which motion came on now to be argued.

Mellen, in support of the motion, contended that the case shewed a complete contract between the parties, and an absolute and unconditional delivery in pursuance of that contract: and he insisted that it was too late for the vendors to rescind the contract or to impose conditions, after the delivery without condition to the authorized agent of the vendees. The question in this case is between two sets of creditors of *Todd* and *Worthley*, which of them shall suffer. They ought to suffer who committed the first fault. Now the plaintiffs put them in possession of these goods and permitted them to hold them four days without any interruption or question as to their property in them. Creditors seeing this had a fair ground to presume they belonged absolutely to those who thus quietly held the possession of them(1).

E. Whitman for the plaintiffs contended that the facts taken all together did not amount to a waiver of the original condition attached to the contract of sale. It does not appear that the plaintiffs for one moment intended to part with the goods without further security than the mere promise of the vendees. And when they were finally delivered to *How-*

(1) *Inglis* vs. *Usherwood*, 1 *East's Rep.* 515.

ard one of the plaintiffs immediately followed them and openly declared that they must still be considered as the property of the plaintiffs, until the stipulated security should be given.

The opinion of the court was afterwards delivered by

PARSONS, C. J. The question to be decided in this case is, in whom the property of the boxes of candles was at the time the writ of replevin was executed. The case shews that they were once the undisputed property of the plaintiffs; and unless they have divested themselves of the title to them, they must recover in this action. They at first refused to sell them to *Todd* and *Worthley*, without some further security than their single *assumpsit*. They had probably forgotten, at the moment of actual delivery, the condition for which they had stipulated: and a question arises, on the facts in the case, whether this was an absolute delivery not revocable, or if revocable, yet not revoked. We think they were bound to recollect the condition they had themselves made, and not to have delivered the candles until it had been complied with.

But we do not decide the cause on that point. *Howard*, being the agent of the vendees, had authority to receive the goods, and to consent to any conditions attached to the delivery of them. He received them on board his vessel, under the declaration of one of the vendors, that they should not consider them as sold until they should receive further security. His so receiving them was an assent to that declaration, and his principals were bound by it. The property then continued in the vendors. Had the demands of these creditors originated while the goods were in the possession of *Todd* and *Worthley*, so that it might be fairly presumed that a false credit was given them: or had *Todd* and *Worthley* sold them *bonâ fide* and for a valuable consideration, our opinion would have been otherwise. But upon the facts in the case there must be

Judgment according to the verdict.

ASA BEARCE

versus

SIMON JACKSON, ADMINISTRATOR OF ALEXANDER SHEPARD.

A plan of land taken *exparte* cannot be used on a trial but as chalk.

One in possession of land claiming to hold it in fee simple, is sufficiently seized to enable him to convey: and if he warrant the land, no action lies against him on his covenant of warranty, until an eviction of the grantee or his assigns by a paramount note.

COVENANT BROKEN on a deed of the defendant's intestate conveying certain lands described therein to the plaintiff in fee, and covenanting that the grantor was lawfully seized in fee, and that he would warrant and defend the granted premises to the grantee, &c.

At the trial of this cause before *Thatcher J.* at the last October term in this county, the counsel for the plaintiff offered in evidence a plan of the land described in the declaration, accompanied with the oath of the surveyor who took it, attesting its accuracy. The judge refused to admit the plan, because a plan including the lands in question had been taken by order of court, and with the consent of the parties in this action, which was proved to be accurate: and because the plaintiff's counsel, when he offered the first mentioned plan, acknowledged that it was not of itself legal evidence.

It appearing in evidence thst *Shepard*, the defendant's intestate entered on the land in question about the year 1779, claiming to hold the same under a grant from the commonwealth, and that the plaintiff has quietly possessed the same lands from the date of *Shepard's* deed to him, the judge directed the jury that, if they believed the said evidence, it was sufficient in law to support the covenant of seizin made by *Shepard*, and that neither that covenant, nor the covenant to warrant and defend, were broken, as no eviction of the plaintiff had been proved, and the jury accordingly rendered their verdict for the defendant.

The plaintiff's counsel filed exceptions to the said opinions of the judge, upon which the cause stood continued to this term, upon the plaintiff's motion for a new trial for the misdirection of the judge.

And now *Whitman*, of counsel for the plaintiff, contended that if one conveys land of which he is not lawfully seized, and he covenants that he is so seized, the covenant is broken the instant it is made, and the grantee may have his action

presently and need not wait for an actual eviction to take place, by which time the circumstances of the grantor may make the remedy upon the covenant of no value(1). *Whitman* thought that the plan offered at the trial, which contained lines not in that taken by order of court, when verified by the oath of the surveyor, should have been suffered to be shewn to the jury. But he did not much press this exception.

Mellen, for the defendant, observed that the case did not shew that the plan offered and refused contained any lines not laid down on the other. But this exception, he thought, could not have much weight, since the plaintiff's counsel had acknowledged at the trial that the plan was not legal evidence.

As to the principal exception, *Mellen* insisted that without shewing an eviction the plaintiff could not maintain his action. *Shepard* did not covenant that he was seized by an *indefeazible* title, but only that he was *seized*. The case finds this to be true. And this observation is a sufficient answer to the *dictum* from *Sheppard's Touchstone*. If in fact the grantor had not been so seized as to entitle him to make this covenant, the defendant, it is acknowledged, would have no defence in this action. But the seizin was sufficient to support the covenant when it was made, and it will be early enough for the plaintiff to bring his action when he shall be disturbed in his possession by one shewing a title paramount to that of his grantor.

The opinion of the court was afterwards delivered by

PARSONS, C. J. We are satisfied that the judge was correct in rejecting the plan. Anciently the land was not described in the declaration; but the plaintiff was bound to give the defendant a view. The practice here has been to describe the land in the declaration, and, if necessary, to send the jury to view it. But to supersede the necessity of either of those views, a very convenient practice has arisen, to have a plan taken under a rule of the court by a surveyor appointed by the court, or agreed upon by the parties, who is sworn to the faithful execution of the trust, as are

(1) *Shep. Touchstone*, 170.—*Cro. Jac.* 369.—*Dyer*, 303.

Bearce *vs.* Jackson, admr.

also the chainbearers. And his duty is to give notice to the parties, and to mark on the plan any monuments or lines, which either of the parties shall request. A plan taken *ex parte* can never be used but as chalk, unless by consent.

As to the other exception, it is very clear that the defendant's intestate, being in possession claiming a fee simple in the land, was able to convey. So the covenant of seizin was not broken. And to entitle the plaintiff to recover on the covenant of warranty, he must shew an actual eviction or ouster by a paramount title.

Judgment according to verdict.

Memorandum. May term 1806, at *Portland*, *Ezekiel Whitman*, Esquire, and June term 1806, at *Wiscasset*, *James D. Hopkins*, Esquire, were appointed examiners of candidates for admission as counsellors and attornies within the county of *Cumberland*.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF KENNEBECK.

MAY TERM, 1808.

AT AUGUSTA.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL,
HON. GEORGE THATCHER, } JUSTICES.
HON. ISAAC PARKER,

JOSEPH BOSWELL *versus* NATHANIEL B. DINGLEY.

ASSUMPSIT by a deputy sheriff, for services performed by him at the defendant's request, in arresting and committing two persons upon executions issued in favour of the defendant.

When a sheriff has arrested a debtor in execution, and committed him to prison, and the debtor afterwards takes the benefit of the poor prisoner's act, the sheriff is entitled to demand and receive his fees of poundage and travel of the judgment creditor.

At the last June term in this county, the parties submitted the cause to the opinion of the court upon a statement of facts in substance as follows.

The defendant having recovered two several judgments in the court of common pleas for this county, against one *James Stackpole* and one *Joseph Doe*, in personal actions, sued out his writs of execution upon those judgments, and delivered the same to the plaintiff *Boswell*, then a deputy sheriff of this county, to be by him served according to the precepts thereof. The plaintiff, not being able to find any property whereon to levy said executions, arrested the said *Stackpole* and *Doe*, committed them to the gaol in *Augusta*, and duly returned the said executions. The said *Stackpole* and *Doe*, after their commitment, took the benefit of the act for the relief of poor prisoners committed by execution for

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debt, and were discharged from their imprisonment, pursuant to the provisions thereof, and have never since paid any part of the said judgments, or of the fees arising upon their said commitment. The items of those fees are stated, and amongst them are certain charges for extra services beyond the regular fees chargeable by law.

Upon these facts, if the court should be of opinion that the plaintiff is entitled to recover the sums demanded in this action or any part thereof, judgment to be entered accordingly, otherwise the plaintiff to become nonsuit, and the defendant recover his costs.

Rice, for the plaintiff, relied on the statute establishing and regulating the fees of officers [1795, c. 41.], and he contended that when a sheriff has levied an execution upon the body of a debtor, he has completely fulfilled the precept of the execution, and in common justice is entitled to his due and legal reward. Although the creditor may eventually derive no benefit from the service, the officer is responsible for the whole amount of the judgment, if he either neglects to arrest the judgment debtor, or having arrested him, suffers him to escape out of his custody.

Wilde, for the defendant, acknowledged that there seemed to be some appearance of hardship in compelling an officer to perform services, for which he was legally entitled to no reward. But the same thing frequently occurs to sheriffs. When they have a warrant to arrest one charged with a crime, or to search for stolen goods, if they are unsuccessful in the search, or fail to find the criminal, they are entitled to no recompence for their services, however laborious they may have been. This seems to be an action of the first impression, which of itself furnishes a strong argument that it does not lie. The precept of the execution is to take the debtor's goods, and for want thereof his body, and detain it until *he* pays the money due by the judgment, with the costs of levying. There is no reference, in any event, to the creditor for payment of those costs.

The action stood continued for advisement, and now the opinion of the court was delivered by

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PARSONS, C. J. This is an action of *assumpsit* brought by the plaintiff, a deputy sheriff, for his fees in serving two executions issued at the suits of the defendant: and the cause comes before us on a case made by the parties.

It is agreed that the defendant having sued out two executions, one against *Stackpole*, and the other against *Doe*, delivered them to the plaintiff to be executed; who, for want of goods, chattels or lands of the debtors, arrested their bodies, and committed them in execution, where they remained until discharged under the provisions of the poor debtor's act.

It is said by the defendant that the plaintiff is not entitled to any fees: if he is, he cannot maintain an action against the defendant for them: and if he can, he has demanded more or greater fees than by law he can claim.

Upon the first point we are of opinion that the sheriff is entitled to his fees for poundage and travel in these cases. He took the bodies of the debtors as pledges for the payment of the executions; and he detained those pledges at his own risk against any escape.

On the second point we are of opinion that he can maintain this action against the defendant for these fees. He could not demand payment before he performed the service: and the service was performed for the defendant. Could the officer have found estate of the debtor, he ought to have levied his fees, and thus have indemnified the defendant: and not finding estate he took and held their bodies for the defendant's use. As they were discharged by order of law, the officer may maintain an action for his fees, the authority to levy the fees being for the defendant's benefit, and not to discharge him from satisfying the officer. *Vide Moor*, 468. *Cro. Eliz.* 654.—1 *Salk.* 209. 231.—1 *Roll.* 598. *pl.* 35.

On the construction of the *English* statutes, in actions on simple contracts, and judgments for a debt certain, the plaintiff, and not the defendant pays the expense of levying, but if the judgment be for a penalty, the plaintiff may levy his whole debt independent of the charges of execution. In this state there is no distinction of actions; for in all executions

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the expense of levying is a charge on the debtor, in favour of the creditor.

As to the third point, the plaintiff must recover only the fees provided by law, the court having no discretion to make him any allowance.

Judgment for the plaintiff.

CHANDLER DOW *versus* JAMES TUTTLE.

Where the promisee of a note, payable at a day certain, contracts at the time the note is given, not to demand payment of it, until a certain time after its maturity, such contract is a collateral promise, for the breach of which, if there be a legal consideration, an action may lie, but it will be no bar to an action on the note, when due by the terms of it.

ASSUMPSIT by the endorsee against the maker of a promissory note, dated February 16th, 1804, payable in one year from the date to *Benjamin Dow*, and by him endorsed to the plaintiff on the 12th day of July, 1805.

Upon *non assumpsit* pleaded, the action was tried at the last September term in this county before *Thatcher*, *J.* and a verdict being found for the plaintiff, the defendant filed his exceptions to certain directions and opinions of the judge, upon which the cause now came before the court.

From the exceptions it appears that after the note declared on had been read to the jury, the defendant offered to prove that at the time of making the note, it was agreed between the promisor and promisee, and was the condition on which the note was given, that payment should not be demanded until the expiration of five years; and that the promisee would not sell or part with the note. The defendant also offered to read to the jury a paper in the following words, *viz.* "*Cornville*, February 15, 1804. These lines "may certify that I the subscriber agree with *James Tuttle* "to wait on him for the money due me, 'till he turns his pro- "perty to the best advantage. *Benjamin Dow*;" and to prove by witnesses that the said writing was made and signed at the same time with the note declared on, though bearing different dates, and constituted part of the same contract; and further to prove that said *Tuttle* should be allowed five years to turn his property as mentioned in said writing; that the paintiff was present, and had full knowledge

of all the agreements aforesaid; and that the defendant refused to sign the note, until the above condition and agreement were made. The plaintiff's counsel objected to the admission of this evidence, and the judge refused to admit it, and directed the jury to find a verdict for the plaintiff.

Bridge, for the defendant, contended that from the privity of the plaintiff to the agreement stated, and from the note's being dishonoured before its negotiation, the defendant was entitled to every advantage of the agreement, in the same manner as if the action had been brought by the promisee, and the different agreements constitute but several parts of one entire contract(1). Suppose a covenant to pay money in a year, and in the same instrument a covenant of the payee not to compel payment under five years: this would be a condition not repugnant to, but consistent with the first covenant.

Rice, for the plaintiff, insisted that this agreement made no part of the original contract, which was a plain, explicit and unconditional promise to pay the money at a day certain: and to shew that parole evidence cannot be received to contradict an agreement in writing, he cited the case of *Meres & al.* vs. *Ansell & al.*(2).

The opinion of the court was afterwards delivered by

PARSONS, C. J. We are satisfied that the agreement, proposed by the defendant to be given in evidence at the trial, is not to be considered as a part of the contract with the note. That is a promise to pay to the promisee or his order a sum of money in one year. If the agreement was a part of this contract, it would be repugnant to the note, and destroy its effect. The agreement, although made at the same time, must be considered as a collateral promise of the promisee's, for the breach of which, if there be a legal consideration, an action would lie. In chancery it would be a sufficient ground for an injunction against the plaintiff, proving his knowledge of it before he purchased the note: And at law perhaps, it may support a motion to stay proceedings, by granting imparlances, until the plaintiff could put

(1) *Gold* vs. *Eddy*, 1 *Mass. Rep.* 1.
(2) 2 *Wils.* 275.

Dow *vs.* Tuttle.

it in suit consistent with the agreement. But on this last point it is not now necessary to decide.

As we consider the agreement as collateral to the note, the evidence was properly rejected, and a new trial cannot be granted.

Judgment according to verdict.

THE PROPRIETORS OF THE KENNEBECK PURCHASE

versus

JOHN SPRINGER.

When one enters on land, claiming a right to it, and gains a seizin by his entry, his seizin shall extend to the whole parcel, to which he claims a right: —but when one enters without claiming a right, his seizin cannot extend farther than his actual occupation.

To constitute a disseizin of the owner of uncultivated lands, the entry and occupation of the disseizor must be such that the owner may be presumed to know that there is a possession adverse to his title.

THIS was a writ of entry, and was tried upon the general issue pleaded and joined, at the last September term in this county, before *Thatcher, J.* After a verdict for the demandants, a new trial was moved for by the tenant, for reasons which would appear in the judge's report of the evidence.

From that report it appears that the action was brought to recover possession of the northerly half of lot numbered thirty-two in the township of *Augusta*, on the second mile or range of lots on the west side of *Kennebeck* river.

The demandants proved title and possession of the demanded premises in the year 1769. The tenant proved that one *James Springer* entered on a lot adjoining the demanded premises in the year 1775; that in the fall of that year he caused the lot on which he had entered, and also the demanded premises to be surveyed, and the bounds thereof to be marked by spotting trees; that he fenced a part of the lot on which he had entered, and continued to occupy the said lot until his death; that sometimes he cut the hay on a small meadow, part of the demanded premises, but never inclosed any part of it; that in the year 1792, he conveyed the same by deed of release and quitclaim to the tenant, who thereupon entered, and has held possession of the premises under that

deed ever since. Upon this evidence the judge directed the jury, that they ought to find a verdict for the demandants, and they found accordingly.

Whitwell, for the tenant, observed that the *English* law, on the question what constituted a disseizin, would very ill apply to the situation of the lands in this uncultivated part of the country. Enclosures here are for two very distinct purposes. One was to secure the crop from the ravages of beasts; but another well known object was to shew a claim of title. This latter purpose is equally answered by surveying the land and placing such visible and notorious marks around the land as designated the intention of the occupant. And this latter method has been considered in this part of the country as much a disseizin, as enclosing with fences.

Wilde, for the demandants, to shew that a mere entry upon land, without expelling the tenant, does not constitute a disseizin, cited and relied upon 1 *Salk.* 246. *Anonymous.*—1 *Burr.* 107. *Taylor* vs. *Horde & al.*—*Co. Lit.* 181.

The opinion of the court was afterwards delivered by

PARSONS, C. J. The demandants sued the tenant in a writ of entry, counting on their own seizin within thirty years, and demanding the northerly half of lot numbered thirty-two in the second range of lots, of which they had been disseized by the tenant. On the trial upon the general issue the jury found a verdict for the demandants: and the tenant moves for a new trial, because, as he supposes, the verdict was against evidence, which is reported by the judge.

The tenant's title was under a release from *James Springer* who, as the tenant alleges, entered more than thirty years before, and disseized the demandants: for no evidence was given that *James* entered claiming any title or right to the land.

The statute of 1786, c. 13. limits the time of suing any real action by any corporation, declaring on its own seizin, to thirty years next after such seizin. And the tenant insists that by virtue of this statute the demandants are barred by the disseizin done to them by his releasor in 1775, which is more than thirty years before the teste of their writ.

The law upon this subject seems to be very well settled. When a man is once seized of land, his seizin is presumed to

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continue, until a disseizin is proved. When a man enters on land claiming a right or title to the same, and acquires a seizin by his entry, his seizin shall extend to the whole parcel, to which he has right; for in this case an entry on part is an entry on the whole. When a man not claiming any right or title to the land shall enter on it, he acquires no seizin, but by the ouster of him who was seized, and he is himself a disseizor. To constitute an ouster of him who was seized, the disseizor must have the actual exclusive occupation of the land, claiming to hold it against him who was seized, or he must actually turn him out of possession. When a disseizor claims to be seized by his entry and occupation, his seizin cannot extend farther than his actual exclusive occupation; for no farther can the party seized be considered as ousted: for the acts of a wrongdoer must be construed strictly, when he claims a benefit from his own wrong.

Let us now consider the evidence, as applicable to these principles. The demandants proved a title to the tenements demanded, and a seizin in 1769. This seizin must be presumed to be continued until they were disseized, as they continued to claim title to the land. *James Springer* entered on the front lot numbered thirty-two in 1775. He continued in the occupation of that lot, improving and fencing a part and living on it until he died, having in the year he entered caused it to be run round by a surveyor, and trees marked on the lines. This land is not demanded. But the northerly half of lot numbered thirty-two on the second range is demanded. And it appears that when he surveyed the front lot in 1775, he at the same time caused the demanded premises to be run round by the surveyor and the lines marked. There is no evidence that he ever fenced any part of the land demanded until 1792, which is within thirty years, or exercised any act of ownership on it, except that he sometimes cut the grass on a small meadow which was part of it. Having fenced a part in 1792, he conveyed the premises to the tenant, who entered and has occupied the same under his deed ever since.

On considering the evidence we are satisfied that the demandants were not disseized until 1792, by the entry of the tenant: that the running round the land by a surveyor, and

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marking the lines, by the direction of one who claims no title to the land, is not such an exclusive occupation of the land, as can amount to an ouster or disseizin of the demandants. Neither can the occasional cutting of the grass on the meadow by *Springer*, who does not appear to have claimed the land, amount to a disseizin.

To constitute a disseizin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know, that there is a possession of the land adverse to his title: otherwise a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his siezin has been interrupted.

As the tenant set up no title prior to 1792, but relied entirely on the statute as a bar, and as it appears to us, from the facts reported, that the demandants were seized within thirty years next before the teste of their writ, we are of opinion that the conclusion made by the jury from the evidence in the cause was legal, and that their verdict must stand.

Let judgment be entered according to the verdict.

THE PROPRIETORS OF THE KENNEBECK PURCHASE

versus

ABNER BOULTON, JAMES BOULTON, JAMES SAVAGE, SAVAGE BOULTON, JAMES CATING, JOHN WARD, jun. SAMUEL WARD, WILLIAM WARD, JEREMIAH ROBINSON AND JOHN HAMMOND.

In trespass *quare clausum fregit* against several, where the evidence was of three distinct trespasses, each of which was committed jointly by some of the defendants only, (all of them being on the close at the same time,) part of them were defaulted and part pleaded not guilty: the damages for each trespass were rightly assessed jointly against those who jointly committed it: and the damages against the several trespassers were rightly assessed severally.

In such case costs are to be taxed jointly against all the defendants.

THIS was an action of *trespass quare clausum fregit*, in which the plaintiffs charged the defendants with breaking their close and cutting down their trees.

Proprietors of the Kennebeck Purchase vs. Boulton & al.

The three *Boultons*, with *Savage* and *Cating*, were defaulted: the other five defendants pleaded severally the general issue, which was joined by the plaintiffs.

A jury was empannelled before *the chief justice* at the sittings after the last May term in this county, as well to assess the damages against the five defendants who had been defaulted, as to try the several issues.

Upon the trial there was evidence that all the defendants were at the same time on the plaintiffs' close, cutting down their trees, and making them into shingles, which they carried away. But it appeared that the five defendants, who were defaulted, formed a company by themselves, and cut down the trees, and made and carried away the shingles, for their own use, unconnected with any of the other defendants. It also appeared that the three *Wards* and *Robinson* formed another company by themselves, and the trees they cut down and the shingles they made and carried away, were for their own use unconnected with any of the other defendants. And it also appeared that *Hammond* was associated with a third party, he only of that party being sued, which third party cut down trees, and made and carried away their shingles for their own use, unconnected with any other of the defendants.

On this evidence a question was made at the trial, in what manner the damages ought to be assessed. *The chief justice* directed the jury, that if they were satisfied that all the defendants, who had pleaded, were guilty, they might assess joint damages against the five defendants who were defaulted, according to the injury they had done the plaintiffs: that they might assess joint damages also against the three *Wards* and *Robinson*, estimating the damages according to the injury the plaintiffs had received from them: and that they might assess several damages against *Hammond*, measuring them by the same rule. The jury found the defendants guilty, who had pleaded not guilty, and assessed the damages against all the defendants according to the direction given them by the judge.

The defendants who had pleaded moved for a new trial on account of this direction, to obtain the opinion of the whole court as to the rule of assessing damages in this case.

The plaintiffs also, if the verdict should not be set aside, moved the court to direct the clerk in what manner he should tax the cost.

The action stood continued for advisement until this term when

PARSONS, C. J. observed that the five judges had conferred together upon his report, and upon consideration were all of opinion that the damages were rightly assessed by the jury.

The law upon this subject seems to be well settled. When the trespass is found by the jury to be committed severally by the defendants, who plead severally, the damages ought to be severed: but if the trespass be joint, the damages must be jointly assessed, although the defendants plead severally. [11 *Co.* 5. *b. Heydon's case.*] In the case at bar, it appears from the report of the judge, and from the verdict, that there were three distinct trespasses charged in the declaration, but that each trespass was jointly committed by some of the defendants only. The damages for each trespass were rightly assessed jointly against those of the defendants, who jointly committed it: and also the damages for the several trespasses were very properly severally assessed. Judgment must be rendered according to the verdict.

As to the costs in this case, the plaintiff is entitled to full costs, to be taxed jointly against all the defendants; for those, who were defaulted, have by their default confessed the trespass, and the others have been found guilty by the jury. The forms of entry in 2 *Towns. Judg.* 234. *pl.* 19. 235. *pl.* 22. and 2 *Litt. Ent.* 513. *Fovargne* vs. *Hampson & Elam*, are in point. The reason is, that the costs of suit are an entire thing, for the payment of which, each of the defendants, who is guilty, is responsible.

Bridge for the plaintiffs.

Wilde for the defendants.

See *Cro. Jac.* 384. 118. 349.—1 *Wils.* 30.

JAMES L. WOOD *versus* THE INHABITANTS OF WATERVILLE.

A surveyor of highways may recover against his town damages happening to him through a defect in the highways within his own district, unless the defect arises from the surveyor's own neglect.

THIS was an action of the case, wherein the plaintiff declared that there was a public highway leading through the town of *Waterville*, which by law the inhabitants of that town were bound to keep and maintain in good and sufficient repair; and that on the 28th of October then last past the plaintiff's mare, in passing and travelling in said public highway, through a defect and want of necessary repair of a pole bridge or causeway in the same, fell down, and broke one of her legs, whereby she became of no value to the plaintiff: of which defect, &c. the inhabitants aforesaid had notice: whereby they became liable to pay the plaintiff double the value of the said mare, &c.

Upon not guilty pleaded the cause was tried at the last September term, before *Thatcher*, *J.* and a verdict being found for the plaintiff, the defendants moved for a new trial, because the judge refused to admit certain evidence offered by them at the trial, as would appear by the judge's report.

This report states that the plaintiff gave evidence of the facts set forth in his declaration. And the counsel for the defendants moved the court to give evidence that the plaintiff was surveyor of the highways in said *Waterville*, for the year when the injury complained of accrued, and that the part of the highway where, &c. was legally assigned to the plaintiff. This evidence the judge rejected.

There was also a motion in arrest of judgment, for certain supposed defects in the declaration: but this motion was not urged, nor was any decision had upon it.

The motion for a new trial was argued at this term by *Wilde* for the plaintiff, and *Mellen* for the defendants, but as the cause was sent to a new trial on another ground than those taken at the bar, it will be sufficient to recite the opinion of the court as it was delivered by

PARSONS, *C. J.* The plaintiff's action is grounded on the statute of 1786, c. 81. § 7, which provides that any person injured in his person or property through any defect in any highway, causeway or bridge, may recover of those who are obliged to repair them, in case they had reasonable

notice of the defect, double the damages sustained by the injury. On the trial, the defendants offered to give in evidence, that the plaintiff was the surveyor of the defective way in *Waterville*. This evidence was rejected, and for this cause the defendants move for a new trial.

From an examination of the act, it is manifest that the principle, on which damages are given, is that the town have neglected to cause repairs to be made agreeable to the duty enjoined upon them by law, for the accommodation of all persons having occasion to use the highways; and that the party injured is in no fault. For it cannot be presumed that the act intended to provide a remedy for damages sustained by any man through his own wrong.

The *first* section provides that all highways shall be repaired at the expense of the town, in which they are located, by surveyors of highways to be chosen by the town; who are, by the *second* section, to have their respective limits assigned by the selectmen. As this duty is enjoined on the surveyors, so the means of performing it are provided. For by the *third* section the town is directed to raise as much money, as it shall judge necessary, to be expended in labour and materials under the direction of the surveyors. And by the *eighth* section, if the town neglect to raise any money for this purpose, each surveyor may assess a sufficient sum on the inhabitants within his district, to be expended in repairs under his direction. And to compel the surveyor to the faithful performance of his duty, the *eleventh* section provides that he shall refund to the town any fine imposed on it for the defect of the highways within his district, which he ought to have repaired.

From this view of the act, it is clear that the surveyors are bound to repair the highways, but at the expense of the town. And if the town had raised sufficient money, or if it was in the power of the surveyor to assess sufficient, and the ways have not been repaired through his neglect of duty, and by that neglect a defect has existed from which he has sustained damage, it would be a very unreasonable construction of the act, to enable him to recover double damages of the town; as it would reward him for his own faulty misconduct.

Wood *vs.* Waterville.

We are therefore satisfied that the evidence offered ought to have been admitted; but it is our opinion that it would not have been conclusive. If the plaintiff had neglected to spend the money raised by the town, or if the town had refused to raise any money; and the plaintiff had neglected to assess and expend a sufficient sum, he ought to be barred of his action.

But if the town had raised a sum that was insufficient, whether the surveyor could or not in that case assess any further sum, or could employ the inhabitants within his district to labour further in completing the repairs at the expense of the town, without the assent of the major part of the selectmen, it is not now necessary to decide. And if it should appear that in this case an insufficient sum was raised by the town, which had been all expended in labour and materials, and that the major part of the selectmen had refused their assent to the plaintiff's further employing the inhabitants within his district to complete the repairs at the expense of the town, whether the plaintiff, he being a surveyor, shall be considered as in no fault, may be hereafter determined.

Let the verdict be set aside and a new trial be granted, that the jury may have all the testimony necessary to find a verdict on the true merits of the cause.

JOHN PITTS *versus* JOHN WAUGH AND JOSEPH GREELEY.

The law merchant respecting dormant partners does not extend to speculations in land.

IN an action of the case the plaintiff declares that the defendants were partners in the way of merchandizing, jointly negotiating together, particularly in the purchase and sale of divers tracts of land for their mutual profit and advantage: and being so partners as aforesaid, the said *Waugh*, at a day and place named, for value received made a certain note in writing of that date, and with his hand subscribed, and thereby for himself and the said *Greely*, promised the plaintiff to pay him 337 dollars, 50 cents, in three equal annual instalments, with interest from the date: by reason whereof the said *Waugh* and *Greeley* became liable to

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pay the plaintiff the contents of said note according to the tenor thereof; and in consideration thereof promised, &c. There was another count as on a note for the same sum made by the defendants jointly.

The defendant *Waugh* was defaulted. *Greeley* the other defendant pleaded the general issue, *viz.* that he and *Waugh* never promised, &c.

Upon the trial of this issue, before *Thatcher J.* at the last September term in this county, the plaintiff offered to read to the jury a promissory note signed by the said *Waugh*, of the tenor following: "*Tyngsborough*, May 19, 1803. For val- "ue received I promise *John Pitts*, Esq. or order the sum "of three hundred and thirty seven dollars and fifty cents, in "three equal yearly payments, with interest from the date, "as witness my hand, *John Waugh*;" and to prove also, that before and at the time of making and signing said note, the defendants were partners, jointly negociating together, as mentioned in the declaration: and that said note was made and signed by the said *Waugh* on the partnership account aforesaid, and for lands purchased for the joint benefit of the defendants, but conveyed to the said *Waugh*. This evidence the judge refused to admit. The plaintiff excepted to the opinion of the judge, and a vedict being rendered for the defendants, the plaintiff moves for a new trial on that ground.

The motion was submitted to the court at this term without argument, and the following opinion delivered by

PARSONS, C. J. The plaintiff's action is against the defendants on a note made and signed by *Waugh*, one of the defendants. As the note does not purport to be signed by *Waugh* and *Greeley*, nor by *Waugh* for himself and *Greeley*, the plaintiff must contend that *Greeley* is answerable as a dormant partner with *Waugh*: and the plaintiff offered to give evidence that they were partners in trade, negociating together particularly in the purchase and sale of lands for their mutual profit: and that *Waugh* signed this note on the partnership account, and for the lands purchased for their joint benefit. This evidence being rejected, the plaintiff moves for a new trial.

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By the law merchant, a man may be answerable as a dormant partner, on a contract made by the partnership, of which he is in fact a member. But this law is confined to trade and commerce, and does not extend to speculations in the purchase and sale of lands. When lands are sold, no man, as a dormant partner, can claim any part of the lands by virtue of any conveyance, to which he is not, on the face of it, a party. If the nominal purchaser chuse to hold the lands, the party who advanced the money, if not named as a grantee, can have no title to the land, whatever remedy he may have against him to whom the land was conveyed: he cannot therefore be holden to the vendor for the payment of any part of the consideration, unless he has agreed to be liable.

In this case there was no evidence offered, that the land was conveyed by the plaintiff to *Waugh* and *Greeley*, or that *Greeley* in any manner authorized *Waugh* to bind him to the payment of this note: or that the plaintiff sold the land on *Greeley*'s credit, or knew that he had any interest in the purchase: nor was there any evidence offered, that *Greeley* knew of the purchase, or did or could derive any benefit from it. This is decisive: for by the law merchant a man is holden a dormant partner, who is not known in the partnership, because he interested in the profits of the trade: and as the conveyance was made to *Waugh*, *Greeley* can derive no benefit from it.

However, to prevent mistakes, we repeat that the law merchant does not extend to speculations in land. And by the statute of frauds no man is chargeable on any contract concerning the sale of lands, but on some memorandum in writing, signed by himself, or by his agent lawfully authorized. In this case there is no colour for considering *Waugh* as an authorized agent of *Greeley* within the satute.

Upon every view of the case, the evidence was properly rejected; and a new trial cannot be granted.

Let judgment be entered according to the verdict.

Mellen and *Withwell* for the plaintiff.
Wilde and *Perley* for the defendants.

JER EMIAH FAIRFIELD

versus

OBEDIAH C. WILLIAMS AND ABIJAH SMITH.

If an administrator binds himself to convey part of his intestate's land to A. B. it is no legal defence to an action upon the obligation, that the estate being insolvent, he has sold the land, under a license of court, to the highest bidder, the obligee being present and requesting him so to do: —Nor that since the obligation the whole of the land has been covered by a town way legally laid over it; tho' this latter fact may avail the defendant upon a hearing in equity.

DEBT upon bond. Upon oyer of the bond and condition, the latter is recited as follows, *viz.* "The condition "of the foregoing obligation is such, that whereas the said "*Williams* and *Smith* have agreed to sell and convey to "the said *Fairfield* a certain piece or lot of land situated in "the town of *Winslow*, described as followeth, &c.: Now "therfore if the said *Williams* and *Smith, in their said ca-* "*pacity or otherwise,* shall make and execute to the said "*Fairfield* his heirs and assigns, a good and sufficient deed "of conveyance of the premises above described, and war- "rant and defend the same to him and them free and clear "of all incumbrances, excepting roads, within one year "from the above date; and shall save the said *Fairfield* "harmless from any let, suit, molestation, or disturbance by "any of the heirs of the said *Obadiah Williams*, Esq. or "any other person or persons, by their means, right or ti- "tle, then the above obligation to be void: otherwise to remain," &c.

The defendants then plead in bar that they, as joint administrators of the estate of the said *Obadiah Williams*, obtained an order from the court of common pleas for this county, to sell the real estate of the said *Obadiah Williams* deceased, for the purpose of paying his just debts, said estate being insolvent; that they, in pursuance of said order, after duly advertising the sale, did expose the same to sale at public vendue, and at the special instance and request of the plaintiff, he being then and there present, exposed to sale the premises described in said writing obligatory, they being part of the said real estate of said *Williams* deceased; and the same premises were struck of to one *Levi H. Perkins*, he being the highest bidder therefor. And the said *Smith* and *Williams* aver that they have saved the said *Fairfield* harmless from any let, suit, molestation or disturbance by any of the heirs of the said *Obadiah Williams* or any other person or persons by their means, right or title.

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And for a second plea in bar, the defendants say that before the making and executing the said writing obligatory, *viz.* on, &c. the selectmen of the said town of *Winslow* laid out a certain town road, &c. [*describing it*]: which road was afterwards duly accepted by the inhabitants of said town, and recorded as a town way. And they aver that the said road covers and extends over the premises mentioned in the said writing obligatory; and that the said road has never since been discontinued, but remains as a town road. And this they are ready to verify. Wherefore, &c.

The plaintiff demurs to both these pleas in bar, and the defendants join in demurrer; and the parties submitting the cause without argument to the court, their opinion was afterwards delivered as follows by

PARSONS, C. J. It apears from the first plea, that *Obadiah Willliams* died seized of the land mentioned in the condition of the bond; that the defendants, having obtained license to sell the same for the payment of the deceased's debts, they accordingly sold it at public auction to one *Perkins*, the highest bidder; that the plaintiff was present at the sale; and that he requested that the land might be sold at auction. These facts are pleaded in bar, to which there is demurrer and rejoiner. And it is very clear that this bar is bad. It is not a performance of the condition, nor is it any legal excuse for not performing it. The plaintiff could not obtain a legal title, but by a sale at auction, in which he was the highest bidder, or some other person, from whom he might afterwards purchase. It was the business of the defendants to procure some person to become the highest bidder, who would reconvey to them, or convey to the plaintiff who was not obliged to bid higher than any other person: and he acted very properly in consenting to, and in requesting a sale at auction, without which he could obtain no legal title.

The *second* plea in bar alleges that before the execution of the bond, the whole land was legally covered by a highway laid out by the selectmen, and approved by the town. To this plea also there is a demurrer and joinder. This second plea is also bad. The soil and freehold still remained in the former owner, notwithstanding the incumbrance of the

road; and the obligors ought to have executed the conveyance, subject to that incumbrance.

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In hearing the parties in equity, the defendants may avail themselves of the location of the road, to reduce the damages arising from the breach of the condition: but that location cannot be pleaded as a performance of the condition or as a legal excuse for not performing it.

The penalty of the bond must be considered as forfeited at law, and the defendants may be heard in equity.

Wilde for the plaintiff.

Rice for the defendants.

GEORGE FITZGERALD

versus

JOHN HART AND GEORGE DOGGETT.

DEBT on bond. Upon oyer of the bond and condition, *viz.* "The condition of the above written obligation is such "that whereas this day said *Hart*, has replevied all the right, "which one *William Bodfish* formerly owned in 550 spruce "logs undivided: Now if said *Hart* shall prosecute said re- "plevin against said *Fitzgerald* to final judgment, and pay "such damages and costs as the said *Fitzgerald* shall re- "cover against him, and also return and restore the same "goods and chattels in like good order and condition as when "taken, in case such shall be the final judgment, then this "obligation to be void, otherwise in force:" the defendants say that the plaintiff ought not to have and maintain his action, except for the sum of forty three dollars and seventeen cents; because they say that after making the said obligation, the said *Hart* entered his said action at the court of common pleas; whereupon such proceedings were had that judgment was rendered by said court that the defendant should recover his costs against the said *Hart*, from which judgment the said *Hart* appealed to the next supreme judicial court for said county, where after sundry continuances the said *Fitzgerald* pleaded in substance that the said

A plea in bar to an action of debt on bond, which admits the plaintiff's right to part of the debt is bad.

Fitzgerald vs. Hart & al.

goods and chattels were not the property of the said *Hart*, as set forth in his said writ, but the property of some persons not named therein, whereupon issue was joined, and verdict returned that the goods and chattels replevied were the property of the said *Hart*. The plea then alleges that judgment on the said verdict was arrested, and that *Fitzgerald* recovered his costs taxed at the said sum of 43 dollars 17 cents. But the said court did not order a return of the goods and chattels replevied: And this they are ready, &c. and they pray judgment if the plaintiff shall have and maintain his action, except as to the said sum of 43 dollars and 17 cents, costs as aforesaid: and as to that sum they have nothing to say why judgment should not be rendered against them for the same.

To this plea the plaintiff demurred generally, and the defendants joined in demurrer.

Per curiam. The defendant in his plea admits that the plaintiff has a right of action to recover 43 dollars 17 cents, and yet his plea goes to the action. Clearly it is bad. His defence is in equity, where the penaly will be reduced to the sum justly due.

JANE YOUNG, LIBELLANT, *versus* DAVID YOUNG, JUN.

A charge of extreme cruelty, and of adultery, may be joined in the same libel, and the court will decree according to the evidence produced.

THE libel in this case charged upon the respondent extreme cruelty, and also adultery; and prayed for a divorce *a vinculo*, or such other decree relative to the premises, as to the court should seem just and lawful.

The court sustained the libel, and upon the evidence refused a divorce *a vinculo*, and decreed a divorce *a mensâ et thoro*.

Wilde and *Boutelle* for the libellant.

Rice for the rospondent.

TIMOTHY BOUTELLE, *QUI TAM*, &c. *versus* DAVID NOURSE.

Where a statute imposes a penalty for taking fish, and gives an action of debt *qui tam* for its recovery, if several join in taking the same fish, a recovery and satisfaction against one of the offenders is a good bar to an action brought against the others.

THIS was an action of debt upon the statute of 1797, c. 70, in which the plaintiff, one of the fish wardens of the town of *Waterville*, who sues as well for the county of *Kennebeck*, as for himself, alleges that the defendant at *Winslow* in said county, on the 31st day of May, 1807, the same being Sunday, took seven thousand and two hundred alewives in the river *Sebasticook*, running through the said town of *Winslow*, contrary to said statute, whereby he has forfeited twenty cents for each of said fish, amounting in the whole to the sum of eighteen hundred dollars. Yet though requested, &c.

The defendant pleads in bar of the action, that at the court of common pleas in this county in December last, the plaintiff impleaded one *Jedidiah Morrill*, in a plea of debt, &c. [the declaration being exactly similar to that in the present action] and recovered judgment against the said *Morrill* for the sum of fifteen dollars and twenty five cents debt and costs of suit, which judgment remains in full force and unreversed, and which the said *Morrill* has fully paid and satisfied : and then avers that the taking of the fish described and mentioned in the plaintiff's declaration against the said *Morrill*, is the same taking of the fish described and mentioned in the plaintiff's declaration in this action, and that the defendant was jointly concerned with the said *Morrill* in the said taking of the said fish, and not otherwise, and this he is ready to verify ; wherefore he prays judgment, &c.

The plaintiff demurs generally, and the defendant joins in demurrer.

Todd, for the plaintiff, read the fourth section of the act of 1797, c. 70. for the preservation of the fish in the counties of *Cumberland* and *Lincoln*, which provides " that if any " person or persons shall take or catch any salmon, shad, or " alewives in any of the waters within the said counties be- " tween the 20th day of April, and the 5th day of July " annually ; at any other time than between sun-rise on Mon- " day and sun-rise on Saturday in each week, *he or they* so " offending shall forfeit and pay as a fine for each and every

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"salmon so taken," &c.—And he contended that by this section every offender was severally liable to the penalty inflicted, each persons offence being distinct, and that a recovery against one is no bar to a like recovery against another.

Rice, for the defendant, insisted that one satisfaction is all that the statute requires, and is a good bar to a recovery of a second for one joint offence, as he contended this to be; and he cited the case of *Rex* vs. *Clark*, (1), where it was decided that when an offence created, or made penal by statute, is in its nature single, one single penalty only can be recovered, though *several* join in committing it: but if the offence is in its *nature several*, *each* offender, is *separately* liable to the penalty. And the case put by lord *Mansfield* under the statute for the preservation of the game, agrees precisely in its principle with the case at bar. The case of *Rex* vs. *Bleasdale & al.* (2) is to the same affect.

The opinion of the court was afterwards delivered by

PARSONS, C. J. This action is debt *qui tam* on the fourth section of the statute of 1797, c. 70. against the defendant for taking in *Sebasticook* river 7200 alewives. The defendant pleads that he is not guilty, but with one *Jedidiah Morrill*; and that the plaintiff had formerly impleaded the said *Morrill* for the same offence, had recovered judgment, and that judgment has been satisfied. To this bar there is a demurrer and joinder.

As the statutes imposes a penalty for every alewive taken, to be paid by the offender, we are satisfied that but one penalty can be recovered for taking the same fish.

Although debt *qui tam* lies to recover the penalty, yet the debt arises from a trespass which in its nature is several, as well as joint. The action may therefore be sued against one or more of the joint offenders. But the plaintiff can have but one satisfaction. It appears from the bar, which is confessed by the demurrer, that the plaintiff has already received from *Morrill* a satisfaction for the penalty incurred by taking the same fish mentioned in his declaration. He cannot therefore recover a double satisfaction by maintaining the present action against *Nourse*.

(1) *Cowp.* 610. (2) 4. *Term R.* 809.

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If several persons were fishing at the same time, each with his own net and on his own separate account, they would be separately liable to the penalty, each one for the fish he caught, although they might afterwards agree to throw all the fish into one stock. But that is not the present case.

The plea in bar appears to us to be good, and the defendant must have judgment.

HARRY WHITE *versus* NATHANIEL B. DINGLEY.

A creditor gives his debtor a licence for two years, and in the letter of licence covenants that he will not sue, &c. and that if he shall sue the debtor shall be discharged of his debt: notwithstanding which he sues within the two years, and the debtor pleads the letter of licence in bar and has judgment: he cannot afterwards maintain an action against the creditor on the covenant.

No action lies for damages sustained by being sued in a civil action, unless such an action was malicious and without probable cause

THIS was an action of covenant broken, in which the plaintiff declares that the said *Dingley*, by a certain deed described, among other things covenanted with the plaintiff that neither he nor his executors, &c. should, during the term of two years from the date of the deed, sue, arrest, attach or prosecute the plaintiff for a certain demand which the defendant then had against the plaintiff:—But the said *Dingley*, in no wise regarding his said covenant, but wishing to distress and injure the plaintiff and by that means to compel him to pay the said demand, before the said two years were expired arrested the plaintiff on the demand aforesaid, and committed him to prison, where being unable to procure bail for his liberty, he was compelled to remain for the space of three hundred days, whereby his health was greatly impaired, and his life much endangered.

Upon oyer prayed by the defendant on the deed declared on, it appeared to be a letter of license in common form; by which the several creditors who sealed it gave to the plaintiff full liberty and licence, for two years from the date, to go about and attend to his business and affairs, without any let, suit, &c.—Then follows a covenant that the creditors will not

White vs. Dingley.

sue, &c, and if they shall so sue, &c. then the said *White* shall be wholly discharged against the creditor or creditors so suing, &c.

The defendant then pleads in bar of this action, that he did commence an action on his said demand against the plaintiff before the expiration of the said two years: to which said action the now plaintiff pleaded the said letter of licence in bar, and judgment was rendered therein that the said *White* should recover his costs.

To this plea in bar the plaintiff demurs generally, and the defendant joins in demurrer.

Wilde, for the plaintiff, contended that he was entitled to this action, in addition to the discharge from the debt which he owed. The law of the case must be the same, whether the demand be large or small. But if the demand be of a trifling sum, the barring it by the letter of licence is a very inadequate satisfaction for a tedious imprisonment. The debt was discharged the instant the debtor was arrested(1): it seems absurd then to consider it as satisfaction for a posterior injury. In estimating the damages the plaintiff is to recover in this action, it may be very proper for the jury to deduct the amount of the debt barred out of the damages they shall find. For those damages the plaintiff must have an action, or he is left wholly without compensation for the imprisonment.

The letter of licence contains two distinct provisions. There is first a positive covenant not to sue, &c. within the term granted: and secondly there is a particular covenant for a specific forfeiture, independent of the other, if he shall sue. We prove the first covenant broken, and our title to damages follows of course.

Mellen, for the defendant, argued that the covenant that the creditor should be barred of his debt was either an agreed measure and liquidation of the damages to be occasioned by the breach of the covenant not to sue, &c. or it is the agreement of the parties that the party breaking his covenant shall pay so much by way of forfeiture or penalty, which indeed amounts to the same thing.

(1) *Bac. Abr. Covenant, A.*

In the case of *Lowe* vs. *Peers*(2), lord *Mansfield* says, "There is a difference between covenants *in general*, and "covenants *secured by a penalty of forfeiture*. In the lat- "ter case, the obligee has his election. He may either "bring an action of debt for the penalty, and recover the "*penalty;* (after which recovery of the penalty, he cannot "resort to the covenant; because the penalty is to be a sat- "isfaction for the whole:) *or if* he does *not* choose to go for "the penalty, he may proceed upon the *covenant*, and re- "cover *more or less* than the penalty, *toties quoties*."

The same doctrine is laid down by his lordship in the case of *Bird* vs. *Randall*(3). In the case at bar the plaintiff *has gone for the penalty*, by pleading the licence in bar of the action, and he cannot now resort to the covenant.

The plaintiff might in the former action have pleaded to the merits if he had so pleased, instead of availing himself of the penalty in the covenant. Had he done so, there might have been some ground for this action. But he chose to demand the penalty, and it was in effect paid the moment it was demanded, thereby discharging the defendant from any other action.

The opinion of the court was afterwards delivered by *PARSONS, C. J.* We are satisfied that this action cannot be maintained. The forfeiture of the debt is not in the nature of a penalty, but is a liquidation of the damages to be paid in case of a breach of the covenant on the part of the creditor. The parties have made their contract, and we have no authority to alter it, or to make another for them in its stead.

No action, by the common law lies for damages sustained by suing a civil action, when the plaintiff fails; unless it be alleged and shewn to be malicious and without probable cause.

Defendant's plea good.

(2) 4 *Burr.* 2228.
(3) 3 *Burr.* 1345.

EZEKIEL BROWN, PLAINTIFF IN ERROR,

versus

ABEL CHASE.

Assumpsit lies against a spendthrift under guardianship, in which he may defend by his guardian.

Costs are not given on a writ of error, where the judgment is reversed for error in law.

THIS writ of error was brought to reverse a judgment of the court of common pleas for this county, in an action originally commenced before a justice of the peace, and carried by appeal to the common pleas.

The original action was *assumpsit*, sued by the defendant in error against the plaintiff in error as he was guardian of one *George Fitzgerald*, a spendthrift. The declaration was upon a promise of *Fitzgerald*. The plaintiff in error pleaded that *he* never promised in manner and form as the plaintiff had declared. Issue being joined upon this plea, the jury returned their verdict that *Fitzgerald* promised, and they assessed the damages against him. The judgment of the common pleas upon the verdict was, that *Chase* recover against *Brown* (in his capacity of guardians as aforesaid.)

The court reversed the judgment without argument, because the verdict does not find the issue joined, nor does the judgment follow the verdict. They also said that the action ought not to have been brought against the guardian, but against the spendthrift, who might defend by his guardian.

Rice, for the plaintiff in error, moved for costs.

The chief justice observed that he saw no sufficient reason why costs should not be given. But the practice having been uniform not to grant them, where the judgment is reversed for error in law, it cannot be shaken without great consideration. And the motion was denied.

Vose for the defendant in error.

SAMUEL LIVERMORE *versus* JOSEPH BOSWELL.

THIS was an action of debt brought to recover of the defendant, who was a deputy sheriff, the penalty of thirty dollars imposed by statute 1795. c. 41. § 6. commonly called the fee bill, on any person who shall wilfully and corruptly demand and receive any greater fee or fees, for any of the services in that act enumerated, than are therein allowed and provided.

The declaration recites the provision of the statute that the fees of sheriffs for levying executions in personal actions shall be for the first one hundred dollars, four cents for every dollar: for every dollar above that, and not exceeding two hundred dollars, two cents for every dollar: and for all above two hundred dollars one cent for every dollar: travel four cents a mile: Also the section imposing the penalty. The declaration then alleges that the defendant, being a deputy sheriff as aforesaid, at a day and place named, had in his hands and possession *our execution* in favour of, &c. against the plaintiff, *which execution issued from the clerk's office of our Court of Common Pleas* for the sum of 80 dollars 56 cents damage, and 18 dollars 27 cents costs of suit. And the said *Boswell*, having said execution in his hands and possession as aforesaid, did then and there for levying and collecting the sum of fifteen dollars on said execution, wifully and corruptly demand and receive of the said *Livermore* more than after the rate of four cents on a dollar, and more than after the rate of four cents per mile, *to wit*, the sum of four dollars for levying and collecting the sum of fifteen dollars. And the plaintiff avers that the fee allowed by law,, and which the said *Boswell*, in his said capacity was authorised to receive, amounted to the sum of sixty-four cents and no more. Whereby an action has accrued to the plaintiff, &c.

The canse was tried at the last September term in this county before *Thatcher*, *J.* upon the general issue, and a verdict found for the plaintiff.

* In an action against a sheriff for extortion in receiving illegal fees on the service of an execution, a declaration which describes the parties to, and the date of the execution is sufficient after verdict.—So if it shews the sum received as fees and the sum levied, without setting forth the whole transaction.

If the date of an original writ is posterior to the date of the service, this being matter in abatement is waived by the defendant's appearing and pleading the general issue.

Livermore
vs.
Boswell.

The defendant moved in arrest of judgment.

1. "Because it does not appear by the plaintiff's declaration, from what court the execution therein set forth issued, nor to what court the same was returnable.

2. Because it does not appear from said declaration how much was levied and collected by force of said execution.

3. Because it appears by the plaintiff's writ that the same was never legally served on the said *Boswell*, the coroner's return bearing date the 26th of November, 1806, and the writ bearing date the 25th of December, 1806."

This motion was briefly argued at this term by *Wilde* for the plaintiff, and *Mellen* for the defendant: after which the opinion of the court was delivered by

PARSONS, C. J. If the *first* objection had been taken upon demurrer it might have prevailed, but it is cured by a verdict; for the jury could not have convicted the defendant, unless a regular execution, in due form, and issued by a court having jurisdiction, and not then returnable, had been given to them in evidence. The declaration states the parties to, and the date of the execution, so that a judgment in this action may be pleaded in bar to another action for the same extortion, averring the indentity of the judgment and execution.

The *second* objection is, that there is no allegation of the sum levied and collected by force of the execution. It is alleged that for levying and collecting fifteen dollars, the defendant received four dollars; and that the fees received were greater than are allowed by law for poundage and travel: which is certain enough. For it is not necessary to set forth the whole transaction in this case, as in usury, where the illegal contract must be precisely set forth and proved.

The *third* objection goes to the service of the original writ in this action. But this is matter in abatement, which is waived by the defendant's appearing and pleading the general issue.

Let judgment be entered according to the verdict.

COMMONWEALTH *versus* NATHAN BARLOW.

An assault with intent to murder is not a felony either at common law or by statute of 1804, c. 123.

THE defendant and two other persons were indicted on the fifth section of the statute of 1804, c. 123, for assaulting and shooting at one *Moses Robinson*, with the intent to murder him. The defendant having been apprehended was tried before the *chief justice* during the present term, and was convicted.

After the verdict he moved in arrest of judgment, because the offence was not charged to have been committed feloniously, as it ought to have been. This motion was shortly argued by *Wilde* for the prisoner, and the *solicitor general* for the government before *the chief justice*, and *Sewall*, *Thatcher*, and *Parker* justices, who overruled it, and the defendant was sentenced on the indictment.

The court observed that anciently an attempt to commit murder was held to be a felony at common law, according to the maxim *voluntas pro facto reputatur:* but that when *Staundforde* wrote, and ever since, the attempt only has no been considered as a felony, but as a misdemeanor highly aggravated(1). The indictment therefore properly described the offence as a trespass, unless it was made felony by the statute, on which it was drawn. By the words of this statute, every person who shall with a dangerous weapon, and with an intention to murder, assault another, shall upon conviction be deemed a felonious assaulter, and shall be punished by imprisonment or confinement to hard labour.

It was argued that because the offender on conviction shall be deemed a felonious assaulter, the statute had made the offence felony.

But *the court* said that in the construction of a penal statute, a misdemeanor could not be considered as made a felony, but by express words, or by necessary implication. Generally new felonies are created by express words, as by declaring that the offence shall be taken to be a felony, or

(1) *Staun. P. C.* 17.—1 *Lev.* 146. *Bacon's case.*

Commonwealth vs. Barlow.

that the offender shall be deemed a felon. And when a statute provides for the punishment of the accessaries after the fact as distinct offenders, the perpetrators of the fact must be considered as felons, because to felony only are there accessaries after the fact. But in this statute the word *felonious* may be applied to the disposition of the mind of the offender, as aggravating a misdemeanor, and not as descriptive of the offence.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF LINCOLN,

JUNE TERM, 1808.

AT WISCASSETT.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL,
HON. GEORGE THATCHER, } JUSTICES.
HON. ISAAC PARKER,

PAUL TWAMBLY *versus* PATRICK HENLEY.

THIS was a real action tried before *Thatcher J.* September term, 1806. The demandant, excepting to the judge's rejection of a witness, moved for a new trial on that ground. The point was opened to the court at the last June term in this county by *Stebbins* for the demandant, and *Wilde* for the tenant, and the action was continued for advisement. And now at this term the opinion of the court was delivered as follows by

PARSONS, C. J. This action comes before the court upon exceptions filed by the demandant, because the judge rejected one *John Borland* as a witness.

Borland, claiming to be seized of the land demanded, on the first day of January 1776, by his deed of that date, conveyed it to the demandant, with a covenant that he had full power, good right, and lawful authority to sell the land, and a further covenant of warranty against all persons claiming under him.

The grantor of land, who covenanted in his deed that he had good right, &c. to sell the same, and that he would warrant the premises against all persons claiming them under the grantor, is a competent witness for the grantee in an actionbrought by him for the land against one who does not claim to hold under the same grantor.

Twambly vs. Henley.

Twambly brings this suit, counting on his own seizin against *Henley*, who did not claim under *Borland*: and to prove his title offers *Borland* as a witness, who is excepted to, as being interested by reason of his covenants. The demandant insisted, that he was not interested, because he could not be answerable on his warranty, the tenant not claiming under him; and that his covenant, that he had good right to sell the land to the demandant, was controuled by the covenant of special warranty. But the judge did not admit *Borland*.

The two covenants in the deed are perfectly consistent: the first amounting to a covenant that the lands should pass by the conveyance. And this covenant is not broken, if *Borland* was in fact seized, either by wrong, or by a defeazible title. The covenant of warranty cannot be broken, but by an eviction or ouster by some title paramount to the grantor's, and this latter covenant does not controul the former one.

The witness was offered "to prove the title" of his grantee. From this general expression we must conclude that he was offered to prove the seizin of his grantee claiming under his deed. Now what interest had *Borland* in the event of this suit? If his covenant was broken, it must have been broken presently after it was made. And whether it was or was not broken cannot depend on the event of this suit: neither is the verdict in this cause evidence in an action brought against him by his grantee for the breach of this covenant. If the demandant recover, still if *Borland* had no right to convey, he is answerable to the demandant in an action of covenant broken, and cannot defend himself by this verdict. If the demandant fail, and he sue the witness for the breach of this covenant, the plaintiff cannot give this verdict in evidence to maintain his action.

That the witness will testify under a strong bias, may be admitted, and of this the jury will consider; but not under a stronger bias, than he would, if he had conveyed without covenants. And in the case of *Busby* vs. *Greenslate*(1), the person, who had sold the inheritance, without any covenant *for good title* or warranty was allowed to be a witness

(1) 1 *Str.* 445.

to prove the title of the vendee. In the case at bar, there s no covenant that the grantee shall have a good title, nor any warranty against the tenant. The witness ought to have been admitted, and his credit left with the jury.

Twambly *vs.* Henley.

New trial granted.

EDWARD KELLERAN *versus* BOAZ BROWN.

THIS was a writ of entry, and upon the general issue pleaded was tried before *Thatcher, J.* September term, 1806, when a verdict was rendered for the demandant.

If the tenant in a writ of entry, whereby a freehold is demanded, pleads the general issue, he thereby admits himself to be tenant of the freehold, and is estoppedfrom proving that he is tenant at will only.

A writing without seal cannot operate as a defeazance of a deed under seal.

In support of the action, the demandant read in evidence a deed of *Timothy Manly* conveying the land demanded to the demandant in fee.

The tenant, in defence of the action, having prayed in aid the title of *Timothy Manly*, under whom he claims the premises as his tenant, the counsel for the tenant, to shew the demandant ought not to have judgment, except as in an action upon a mortgage, offered to read in evidence an agreement in writing signed by the demandant and bearing even date with the deed aforesaid, in the following terms, *viz.* "*Thomaston*, May 26, 1800. I *Edward Kelleran* the subscriber, having purchased of *Timothy Manly* a lot of land lying in said *Thomaston*, containing fifty acres (being the lot which the said *Manly* purchased of *Ebenezer Bly*) for which I have received a warranty deed; but if the said *Manly* shall repay me the sum of four hundred dollars, with the lawful interest on the same in one year from the date hereof, I then will reconvey the said lot of land to him. *Edward Kelleran;*" and also offered to prove to the jury that the tenant, *Brown*, at the time of the commencement of this action, and for a long time before, was, and ever since has been, tenant at will of the premises demanded, under the said *Timothy Manly*, the aid of whose title is prayed in this action.

The demandant's counsel objecting, the judge rejected said agreement and evidence as inadmissible. To which

Kelleran
vs.
Brown.

opinion of the judge the counsel for the tenant excepted as erroneous; whereupon the cause stood continued for the opinion of the court upon the said exceptions.

At the last June term in this county, the cause was briefly spoken to by *Mellen* in support of the exceptions, and thence continued for advisement, and now the opinion of the court was delivered by

PARSONS, C. J. The demandant has sued a writ of entry, to recover his seizin of the lands demanded in his writ and count. The tenant pleads the general issue, and to maintain the issue on his part, offers to give in evidence that he is tenant at will to one *Timothy Manly;* and that *Manly* conveyed the lands demanded to *Kelleran* in mortgage. To prove that the conveyance was a mortgage, he offered to read in evidence a contract in writing, under the demandant's hand of the following tenor: [*Here his honour read the agreement before recited.*] But the judge rejected the evidence that he was tenant at will, and refused to let this contract be read to the jury.

As the demandant, in his writ, had demanded a freehold of the tenant, he, by pleading the general issue, had admitted on record that he was the tenant of the freehold. He was therefore estopped from proving that he had not the freehold, but was a tenant at will.

As to the effect of the written contract, if it be an instrument of defeazance at common law of the conveyance made by *Manly* to the demandant, the tenant might have read it in evidence, to shew that the demandant was entitled only to the conditional judgment, as in a suit to foreclose a mortgage.

In chancery, whenever it appears, from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be treated as a mortgage, in whatever form the land was pledged. And if we had all the equity powers of a court of chancery, I should be satisfied that the conveyance in this case, with the written contract of reconveyance, would be deemed in equity a mortgage, and the grantee would be allowed to redeem.

But the equity powers of this court are derived from statute, and are extremely limited. We can relieve mortgagors only in cases where the lands are granted on condition, by force of any deed of mortgage, or bargain and sale with defeazance. [*Vide statutes* 1785, c. 22.—1798, c. 77.] Now a defeazance of any instrument of conveyance must be of as high a nature as the conveyance, must be executed at the same time, and is to be considered as a part of it; so that the conveyance and defeazance must be taken together, and considered as parts of one contract. If therefore the conveyance is by deed, the defeazance must be by deed. In this case the conveyance by *Manly* to *Kelleran* was by deed, and the agreement by *Kelleran* was merely by a simple contract: and however it might in equity have the effect of a defeazance, at law it is not a defeazance of the deed of *Kelleran*.

The counsel for the tenant referred to the statute of 1802, c. 33. which provides that no conveyance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, *or instrument of defeazance*, unless they are registered. This provision cannot avail to enlarge our jurisdiction, which was not within the purview of the act. What shall be deemed an instrument of defeazance must still be determined upon the principles of the common law. The written contract of *Kelleran*, not under his seal, was in our opinion properly rejected as evidence.

Judgment according to the verdict.

Wilde for the demandant.

COMMONWEALTH
versus
THE INHABITANTS OF NEW-MILFORD.

A committee of the court of sessions for locating a highway report a sum to be paid as damages to A. B. without shewing by what town it is to be paid, or in what town the way is. The sessions accept the report. Afterwards on the petition of A. B. they order the damages to be paid by the town of C. before the next term, or a warrant of distress to issue. Upon motion of the town of C. the proceedings on the petition only were brought before the court upon a *certiorari*. The court quashed the *certiorari* as having issued improvidently.

THIS was a *certiorari* issued at the prayer of the inhabitants of *New-Milford*, commanding the court of sessions of this county to send the record of their proceedings upon the petition of *Ezekiel Averell*, in which petition he prayed that the said inhabitants might be ordered to pay him the sum of 160 dollars as damages awarded to him by a committee appointed to alter a highway in said *New-Milford*, and in default of payment that a warrant of distress might issue.

Upon inspecting the proceedings certified, it was found that there was no copy of the record of the proceedings respecting the making the alteration of the way, or the assessment of the damages, except so far as they were recited in the petition of *Averell*, and in the answer thereto by the respondents.

Upon this being suggested by the *chief justice* to *Stebbins* who appeared for the respondents, he observed that the respondents were no party to the former proceedings, not being named in any part of them. Nor does it appear from those proceedings that any part of the way altered was within *New-Milford*. It was upon this fact he principally relied for quashing the proceedings, and he contended that the sessions had no authority to order *New-Milford* to pay these damages, or to issue a warrant of distress for them, as they had never been assessed on that town.

The opinion of the court was afterwards delivered by

PARSONS, C. J. The sessions, on the application of *Nathaniel Bryant* and others, ordered a highway to be altered, and issued a warrant to a committee of freeholders to make the alteration, who in their return located the way as altered, and assessed the damages sustained by *Ezekiel Averell* by the alteration at 160 dollars. But it no where appears in what town the altered way was situated, or over whose land it was located. The sessions however accepted the return, and confirmed the alteration. And afterwards, on the petition of *Averell* alleging that all the alterations were made in *New-Milford*, and that the way altered passed

over his land, and praying that *New-Milford* may be ordered to pay him the damages assessed, the sessions made an order that the same damages should be paid him by that town before the then next term, or the same should be levied by a warrant of distress. On the motion of *New-Milford* the proceedings on this petition of *Averell* have been brought before us.

Upon considering the act, on which all these proceedings are founded [*stat.* 1786, c. 66.] it is manifest that the order of the sessions, that the damages assessed should be paid, is a mere consequence of the judgment of that court in confirming the alterations in the way, and cannot be brought before us as an independent record of that court. It is in fact in the nature of an execution of a judgment, and we must have the whole record before us, to unable us to do justice between the parties. It would be extremely unreasonable to quash the order of sessions directing the payment of the damages to *Averell*, and at the same time have his land incumbered by the alteration. If the alteration has been illegally made, let those proceedings be also brought before the court: and if they are quashed, the order for the payment of the damages will of course be quashed, because the foundation for the assessment of the damages will have failed. The objection to the passing the order for payment is founded on the illegality of making the alteration in the way, and to consider that illegality as a reason for quashing the order of payment, without quashing the whole proceedings, will be in this case that partial justice, which is in fact injustice.

If the *certiorari* had directed all the proceedings to be certified, and the certificate had been defective, diminution might have been alleged, and a new *certiorari* have been issued. In this case the motion by the respondents was confined to the proceedings and judgment on *Averell's* petition for an order of payment. The *certiorari* is conformable to the motion; and all the proceedings were certified, which the writ directed. There is therefore no diminution; and the *certiorari* issued improvidently, and must be quashed. If *New-Milford* is entitled to relief, let them move

Commonwealth *vs.* New-Milford.

for a *certiorari* to bring before the court all the proceedings in the case, so that, upon a view of the whole record, complete justice may be done to the parties.

Writ of certiorari quashed.

Lee for the commonwealth.

ISAAC WORTHEN AND AL. *versus* MOSES STEVENS.

Where demands made by one party only are submitted to arbitrators, if they award a sum in favour of the party on whom the demand is made, no remedy lies on such award.

THIS action was submitted to the opinion of the court, without argument, upon the report of *Thatcher, J.* before whom it was tried at the last September term in this county, and a verdict rendered for the defendants. The facts will appear in the opinion of the court, as delivered by

PARSONS, C. J. The plaintiffs have declared in case on a submission to arbitrators of divers lawsuits, actions, controversies, quarrels and disputes, then pending between them and the defendant in the court of common pleas, and on mutual promises that the award should be delivered to one *Jonathan Greeley*, Esq.; that judgment thereon should be final, and that the parties would abide by and perform the award. The plaintiffs further allege that the arbitrators, pursuant to the submission, awarded that the defendant pay the plaintiffs 58 dollars 73 cents, and deliver a cow to one of the plaintiffs, and pay costs of reference in full of the two actions submitted; that the award was left with *Greeley*, but that the defendants had refused to pay the plaintiffs the money awarded.

To prove this declaration, a paper was offered in evidence in which is recited, that the defendant had commenced an action of trespass against the plaintiffs, and also another action against one of the plaintiffs, which had been entered in the court of common pleas: but this recital is not signed by the defendant. Then follows an agreement of all the parties to submit those two actions, that the report shall be made to *Greeley*, and judgment thereon be final. This paper the judge rejected as irrelevant.

It is not very easy to determine what the parties intended by their agreement. It resembles in most respects a reference acknowledged before a justice of the peace pursuant to the statute of 1786, c. 21. But the demand made by *Stevens* is not signed by him; and the report is not to be made to the court of common pleas, but to a justice. Probably the parties intended a new kind of submission, and on the award the justice was to enter judgment and issue execution. This being found against law, the plaintiffs are now attempting to enforce the award by an action at law, upon an implied contract to perform it.

It is a general rule, that when the parties have made an express contract, the law will not implya contract. How far this rule will apply, when the express contract is of such a nature, that no remedy will lie for a breach of it, when at the same time there is a sufficient consideration to support an implied contract, may be a question. But in this case it is not necessary to determine it.

It is manifest that nothing was intended to be submitted, but two actions commenced by the defendant. No demands of the plaintiffs against him were submitted, unless perhaps a claim for costs in those actions. Yet the referees awarded that the plaintiffs should recover of the defendant a sum of money, and that one of the plaintiffs should recover of him a cow. The arbitrators have exceeded their powers, and the award is not warranted by the submission. The evidence offered of the submission was properly rejected, as having no tendency in law to support the plaintiff's action.

Judgment according to verdict.

WILLIAM FOSTER

versus

NATHANIEL SINKLER AND EZEKIEL THOMPSON, TRUSTEE.

The promisor in a contract notnegotiable but which is assigned in equity cannot be held as the trustee of the promisee after the assignment: but the assignment must be known to the trustee and disclosed by him on his examination, or he will be held.

THE only question in this cause was, whether *Thompson* the supposed trustee had in his hands any goods, effects or credits of the principal defendant, at the time of the service of the writ upon him.

The facts disclosed by *Thompson*, upon his examination were, that prior to his being summoned in this action, he had given to *Sinkler* two promissory notes of one hundred dollars each, one of which was payable in stock; both the notes were due at the time of the service of the writ; neither of them was paid; nor was either of them payable to order.

Before the service of the writ, *Thompson* was informed that a person by the name of *Morton* had called at his house in his absence, and wanted payment of those notes. He also received a letter from *Sinkler*, informing him that he had transferred the notes to *Morton*, and had received some money. But neither *Morton*, nor any other person ever demanded payment of the notes of *Thompson*, nor had he ever seen the notes since he signed them, until he saw them at the court below, when this suit was pending there.

Hasey, for the plaintiff, contended that there was not sufficient evidence of a *bonâ fide* assignment of these notes. There ought at least to appear a notice to the debtor, and some diligence to collect the amount due.

Per curiam. The promisor in a contract not negotiable, but which is assigned in equity, cannot, after the assignment, be sued as the trustee of the promisee. The assignment cannot appear but by the disclosure of the promisor on the interrogatories. The assignee must therefore, if he would avail himself of the assignment, exhibit to the trustee, before he is examined, satisfactory evidence of a legal assignment made before the attachment, that the trustee may in his answers lay this evidence before the court. This is not done in the present case. The trustee has not been called on for payment by any assignee, who exhibited to him the

notes: nor has he had any information of the transfer, which can be considered as evidence of the actual assignment, or of any consideration paid for it. He must be adjudged trustee.

Foster *vs* Sinkler & *trustee.*

JOHN DOLE *versus* ANSEL WEEKS.

A declaration on a promissory note to A. B. or bearer, and alleging theplaintiff to be the bearer is sufficient without stating an express promise to the plaintiff.

THE declaration was "in a plea of the case for that at, &c. on, &c. the said *Weeks*, by his note in writing, of that date, by him subscribed, for value received promised one J. K. K. to pay him or bearer seventy-five dollars, payable, on, &c. And the plaintiff is the bearer of said note: Yet though often requested the said *Weeks* has not paid said sum, but refuses to do it. To the damage," &c.

To this declaration the defendant demurred generally, and the plaintiff joined in demurrer.

Wilde in support of the demurrer. Here is no privity shewn between the parties. It ought at least to appear that the plaintiff came lawfully to the possession of the note(1). When a negotiable note is transferred, a valuable consideration for the transfer is always alleged, and such allegation is an essential part of the declaration, and is the ground on which the law raises the promise to pay to the endorsee. In declarations upon notes payable to bearer, the practice has been uniform, to allege a promise directly to the plaintiff,and such allegation seems necessary upon common principles(2).

Stebbins é contra held the declaration good enough; and he contended that what was not necessary to be proved on trial could not be matter of substance, and no advantage could be taken of the defect of such allegations upon general demurrer. The title of the plaintiff to bring the action as bearer is matter of legal inference. *Stebbins* said he had met with no form of a declaration, in which, after an aver

(1) 2 *Show.* 23.
(2) *Chitty on bills*, 115. 200, 201.—1 *Esp. Dig.* 35.

Dole *vs.* Weeks.

ment that the plaintiff was the bearer, an express promise to pay him was alleged.

Per curiam. The declaration is certainly not in the usual form, it being common to allege notice, whereby the defendant became liable, and in consideration thereof promised,&c.

On a general demurrer we must presume the plaintiff to be the lawful bearer of the note. When there is sufficient matter substantially alleged to entitle the plaintiff to his action, the declaration will be good on a general demurrer. On this ground we shall support this declaration: but we wish practitioners would make it a rule to adhere to established forms in their declarations and pleadings. They would save much trouble to themselves and the court.

Declaration adjudged good.

THE INHABITANTS OF BATH, PLAINTIFFS IN ERROR

versus

THE INHABITANTS OF BOWDOIN.

Where the territory, of which a new town is composed, was before the incorporation an unincorporated place, the incorporation *ipso facto* gives every one inhabiting there a legal settlement.—But where the new town is formed from part of an ancient one, those settled in that place at the date of the incorporation are legally settled in the ancient town.

THIS was a writ of error brought to reverse a judgment of the court of common pleas of this county, respecting the settlement and support of a pauper. The suit was originally commenced before a justice of the peace, from which it was removed to the common pleas, who stated the following facts as the foundation of the judgment afterwards rendered, *viz.*

"That *Mary Hinkley*, the pauper, was born in the town of *Brunswick*, July 19th, 1763; that in 1772, *Gideon Hinkley* purchased an estate of freehold in the town of *Bath*,* and removed with his family (*Mary* the pauper being one) into the said town in February, 1774, and continued with the said *Mary* inhabitants of *Bath* until the latter

* The court must be understood to mean the territory which has since constituted *Bath*, which, at the time referred to, was part of *Georgetown*.

part of February, 1781: that on the 2d day of February, 1781, the said *Gideon* sold his estate in *Georgetown:* that on the 17th of the same February, the second parish in the town of *Georgetown* was incorporated into a town by the name of *Bath:* that in the latter part of the same February the said *Gideon*, with the said pauper, removed from the town of *Bath*, and it does not appear that the said pauper has gained a settlement in any town since her removal from *Bath* as aforesaid."

The court of common pleas adjudged the lawful settlement of the pauper to be in *Bath*, and ordered her to be removed thither, and that the town of *Bowdoin* should recover against the town of *Bath* the sum of twenty pounds twelve shillings for expenses in supporting said pauper from December 20, 1793, to April 5, 1795.

The cause was submitted to the court without argument.

Per curiam. The proceedings, which this writ of error is brought to reverse, were instituted at the suit of the inhabitants of *Bowdoin*, who demanded payment for supplies furnished to *Mary Hinkley*, a pauper, and also her removal to *Bath*, where they insisted that she was settled.

The only question before us upon this record is, whether the pauper had a legal settlement in *Bath*. If she had, the judgment of the court of common pleas is right and must be affirmed: if she had not her legal settlement in *Bath*, the judgment must be reversed.

The only facts, which tend to shew a settlement in *Bath*, are that her father removed into that part of *Georgetown* which is now *Bath* in 1774, having a freehold estate there, and that he continued there until the latter part of *February* 1781. *Bath* was incorporated into a town, by its present name February 17th, 1781.

If he acquired a legal settlement in *Bath*, it must have been gained either by habitancy; but at that time habitancy did not give a settlement without a vote of the town; or it must have been acquired by virtue of the incorporation of *Bath*. If the territory, of which the new town was composed, had before been an unincorporated place, the incorporation would *ipso facto* have given every one then inhab-

Bath vs. Bowdoin in error.

iting there a legal settlement. But such was not the case. That territory had before been part of an ancient town: and every one legally settled in that place at the date of the incorporation, must have been legally settled in *Georgetown*.

The case does not shew a settlement of the pauper in *Bath*. Whether she had a settlement in any other place, it is not necessary for us to enquire; and if it was, the facts are incompetent to shew it.

Judgment reversed.

Memorandum. At the last June term at *Wiscassett*, *Benjamin Hasey* and *Josiah Stebbins* Esquires were appointed examiners of candidates for admission as counsellors and attornies within the county of *Lincoln*.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF HANCOCK,

JUNE TERM, 1808.

AT CASTINE.

PRESENT.

Hon. SAMUEL SEWALL,
Hon. GEORGE THATCHER,
Hon. ISAAC PARKER,
} JUSTICES.

JOANNA PRINCE, ADMINISTRATRIX,

versus

DANIEL SMITH.

How far original entries by the plaintiff in his own hand-writing, supported by his oath are to be received as evidence in *assumpsit* for goods sold and delivered. —They are no evidence of payment of money to third persons by the defendant's order, nor of such demands as in their nature afford a presumption that better evidence exists.

THIS was an action of the case upon an account annexed. The account consisted principally of charges for goods sold and delivered, at sundry times from July 1797, to April 1799, by the plaintiff's intestate to the defendant: besides which several sums of money are charged as paid to sundry persons by order of the defendant, and one article in the account is a charge of four years rent of certain marshes.

Upon the general issue joined the action was tried at June term, 1806, before *Thatcher, J.* and a verdict found for the plaintiff.

At the trial the plaintiff, to maintain the issue on her part offered *J. Nelson*, Esq. as a witness to prove that a certain paper produced by him, and of which the account annexed to the writ was a true copy, was left with him to be put in suit, and that the same was in the hand-writing of *Joseph*

Prince, admx. vs. Smith.

Prince the plaintiff's intestate, and that thereupon he the said *Nelson* commenced the present suit. The plaintiff also offered evidence to prove that the dwelling-house of the said intestate was burnt after the commencement of the present action, and the said intestate, with his books of account therein consumed. The defendant proved that during a considerable part of the time when the charges in the said account purport to have been made, the intestate had a person in his employment, who was known at different times to assist him in delivering articles to the customers.

To the admission of the foregoing evidence the defendant objected, and insisted that the plaintiff ought to be held to produce the persons employed by her intestate as his assistants.

The judge overruled the objections, and admitted the evidence, which was all that was produced by the plaintiff: and instructed the jury that the said evidence was competent for them to consider in support of the issue submitted. The defendant filed his exceptions to the opinions of the judge, and upon that ground moved for a new trial. And now at this term,

Wilde, in support of the exceptions, contended that whatever may be thought of the admissibility of this evidence, as applied in support of the charges in the account of goods sold and delivered, it could never be received as competent evidence in support of the charges of money, of sums paid to order, or of rent. Other evidence, of a higher and better kind, could and ought to be given of those items. The rule, by which less evidence is admitted in a case of necessity than might be otherwise required, does not extend to this case. This is the loosest evidence that can be imagined. It is not pretended that the paper produced by Mr. *Nelson* was the original entry of the charges: it could be nothing more than a copy made by the plaintiff's intestate from his ledger, the original of which, if offered in evidence, would be rejected.

Lee, for the plaintiff, adverted to the distressing casualty which had made it necessary for the plaintiff to rely on this particular evidence. It was all she could produce, and as

there was no ground to suggest unfairness, he hoped the court would view it as a case of necessity, and support the verdict in favour of the true merits of the cause.

Prince, admx. vs. Smith.

The opinion of the court was afterwards delivered by

SEWALL, J. The exceptions in this case present two questions.

1. Whether the statement in the hand-writing of the plaintiff's intestate, purporting to be his account against the defendant, a copy of which is annexed to the plaintiff's writ, was competent evidence for the consideration of the jury, and properly admitted at the trial? and

2. Whether, if competent to any purpose, it was not plainly incompetent as to certain items, particularly the charge of rent, payments to order, &c.? and whether therefore the jury ought not to have been cautioned against allowing these items in their verdict?

In actions of *assumpsit* for articles delivered, or for work and labour performed, the admission of proof by the book of the plaintiff himself appearing to be in his own hand-writing, and supported by his supplementary oath, is a practice, in the extent to which it has been carried, peculiar to *New-England*, if not confined to this state. But it is a practice which has been long established, and seems to have arisen upon the most reasonable grounds, out of the necessity of the case, and a conformity to the actual state of things.

There are, however, obvious difficulties and hazards attending this mode of proof; and it ought not to be extended by any new precedent. Every memorandum of a shopkeeper or labourer is not to be admitted as his book. It is essential to this kind of evidence that the charges, appearing in the hand-writing of the party, are in such a state that they may be presumed to have been his daily minutes of his business and transactions, in which regard is had to the degree of education of the party, the nature of his employment, and to the manner of his charges against other persons. Where this appearance is wanting, and the presumption cannot be made, the evidence has been usually rejected as incompe-

Prince, admx. vs. Smith.

tent. And when having this appearance a plaintiff's books or memorandums are admitted, the evidence remains liable to every objection, which may be suggested, from unfair appearances in the statement of the particular account in issue, or from the whole book or minutes taken together, and which naturally affect the credibility of the evidence.

In the present case, the statement left with Mr. *Nelson* has no appearance of daily minutes kept by the intestate in the usual course of his business. The paper has every appearance of an account drawn out, and contains charges or entries of articles delivered at different times in a period of nearly two years, and respects the defendant only; although the intestate kept a shop in which he was making daily sales. And the paper is dated at the foot, which is generally understood to ascertain the time when an account is drawn out, more than a year after the date given by it to the latest transaction entered. It seems to me, therefore, very difficult, if not impossible to presume the paper admitted as evidence in this trial, to have been the intestate's original and daily minutes of his transactions with the defendant. If it was not this, it was no evidence in itself by any rule or practice that I am acquainted with.

But it is supposed to have been admissible with the further proof intended to shew that the intestate's books, from which this statement might have been copied, had been burnt and destroyed by accident, and from the necessity of the case.

If the proof in this case had extended to shew that the items of this account had actually existed in the intestate's shop-book, where his daily transactions were minuted, and that the transcript offered had been truly taken therefrom; I should have no doubt of the admissibility of a transcript thus compared and proved, upon the ground of necessity, and that it was the best evidence, which the case admitted, under all the circumstances. But there is no evidence to this purpose; and although perhaps the paper admitted was the best evidence, which can be procured in the present case, yet this mere statement of an account, (and the paper, I ap-

prehend, is nothing more) is in itself no evidence or means of proof.

Upon the *second* question there can be no doubt: for whether original minutes, or a proof admissible by necessity, it can have no application, and is wholly incompetent to prove the charges of cash paid to third persons by order, and of the rent of certain marshes. For of these items no book or memorandum of the intestate ever was, or could be evidence: and, with all the accidents, which have befallen this demand, better proof of those items, if true, may still be had. Upon this ground therefore, that the jury ought to have been cautioned against allowing these items; and they would have been, if they had been distinctly noticed at the trial, there must be a new trial, whatever had been our opinion upon the more general question, which I have briefly considered.

New trial granted.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF BERKSHIRE,

SEPTEMBER TERM, 1808,

AT LENOX.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK,
HON. SAMUEL SEWALL,
HON. ISAAC PARKER, } JUSTICES.

MILES AVERY, AND ANOTHER, APPELLANTS FROM A DECREE OF THE PROBATE COURT

versus

ALEXANDER PIXLEY, EXECUTOR.

The *month* within which an appeal from the probate court must be claimed, is a calendar month

Of the revocation of a will.

THE respondent had presented to the probate court in this county for probate, an instrument purporting to be the last will and testament of *William Pixley*, and of which will the respondent was named executor. The judge of probate decreed in favour of the will, and from this decree the appellants appealed.

The decree was passed on the eighth day of June last, when the appellants by parole claimed an appeal, and on the seventh day of July following they filed in the probate office their reasons of appeal, with a bond in due form of law to prosecute the same with effect, and afterwards gave due notice to the respondent of the reasons of appeal.

The respondent now objects to the sustaining of the appeal; because it was claimed by parole, and not in writing;

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and because the reasons of appeal were not filed within the time limited by the statute of 1783, c. 46. § 4.

The court observed that the statute of 1783, c. 46. which gave the appeal from the probate court, did not require it to be claimed in writing; but only that it be claimed within one month after the passing of the decree; that a bond to prosecute be given and filed in the office within ten days after the claim; and that the reasons of appeal be filed within ten days after the security is given. And the court were of opinion that the claim of an appeal need not be in writing; but it was sufficient if the reasons for appealing were filed in the office within a month after the decree; for filing the reasons was a claim of an appeal within the statute: that the reasons of appeal were not seasonably filed, if the statute contemplated a lunar month; otherwise if it intended a calendar month. But in this state, as well before as since the revolution, a month mentioned generally in any act had immemorially been considered as a callendar month: that in the case in *Norfolk* county upon *Draper's* will, upon a probate appeal, given by this statute, the time of claiming an appeal was expressly decided by the court to be a calendar month.

The court also observed that the time, when extended to a calendar month, was too short, when the party aggrieved was absent, and could have no knowledge of the existence of the suit in the probate court, until after the passing of the decree: and they expressed a wish that a provision was made, granting in such cases a longer time for claiming the apppeal. Under the provincial statute six months in all cases were allowed to the party aggrieved to claim his appeal.

The appeal in this case was holden to be regularly prosecuted and pending.

Upon reading the reasons of appeal, it appeared that the appellants objected against the decree that the instrument originally had a seal, which had been taken off, and they contended that this amounted to a revocation of the will.

The respondents insisted that this reason, if true, was insufficient, because a seal was not necessary to the execution of a will.

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The court observed that the statute of 1783, c. 24. which is our statute of wills, requires that a will of lands should be in writing, signed by the testator, or by some person in his presence and by his direction; and that a seal was not required: that it was however usual to annex a seal, and as a will might be revoked, not only by a subsequent will or codicil, or by burning or cancelling the same, but also by its being *torn* or obliterated by the testator, or by his direction in his presence, it might happen that a testator might tear off the seal, which he might consider as an essential part of the execution, with the express design thereby to revoke the will.

Upon this point however they would reserve their opinion, until they heard the evidence. But the appellants failing in their proof, no opinion was expressly given, and the decree was affirmed.

Bidwell and *Whiting* for the appellants.

Ives for the respondent.

COMMONWEALTH *versus* DANIEL MESSENGER.

In a proceeding before a justice of the peace for an offence, the fact must be strictly charged, but a rigid adherence to forms will not be required.

Thus in a complaint for sabbath-breaking, it is sufficient to allege the fact on the Lord's day generally, and to conclude the complaint "against the statutes enacted for the due observation of the Lord's day:" So if the complainant does not shew on whose behalf he complains, nor what the defendant has forfeited, nor how the forfeiture is appropriated.—

No appeal lies to this court from the common pleas in a criminal proceeding brought into that court by appeal from a justice of the peace.

THIS cause originated in a complaint instituted by one *Francis Heare*, before a justice of the peace for this county, October 23d, 1805, charging that the defendant "did, at *Egremont* in said county, on the 13th day of the same October, being sunday, or Lord's day, with force and arms do and perform labour, work or business, (not work of necessity or charity) *to wit*, did travel to and upon the turnpike called the twelfth *Massachusetts* Turnpike, near the dwelling-house of *George Messenger* in said *Egremont*, and near the turnpike gate erected across said turnpike there, and

did then and there with force and arms throw down a fence erected by the proprietors upon said turnpike road, and many other wrongs and injuries the said *Daniel* then and there did and committed with like force and arms, all which is against the peace, laws, honour and authority of said commonwealth, and the statutes enacted for the due observation of the Lord's day."

The defendant having been convicted by the justice, appealed from his sentence to the court of common pleas, where he was again convicted by the verdict of a jury. From the judgment of the court of common pleas upon that verdict he appealed to this court, and a verdict having been found against him here at the May term, 1805, he moved in arrest of judgment for the following causes, *viz.* Because—

1. The charge against him, in the said complaint made, contains no allegation of any matter amounting to an offence at common law, nor does it appear by the said verdict that any offence has been committed by him against the common law of this commonwealth.

2. The charge in the said complaint contains no allegation of any offence by him committed against the form of any statute of this commonwealth, nor does it appear by the said verdict that any offence has been committed against the form of any such statute.

3. The supposed offence charged in the said complaint is not alleged, nor does it appear by the said verdict, to have been committed between the *midnight preceding* and the sun-setting of the Lord's day.

4. The offence charged in said complaint is no where therein alleged to have been committed, not does it appear by the said verdict to have been committed on the Lord's day.

5. The ai complaint contains no allegation of any penalty provided by the law against the supposed offence therein charged.

6. The said complaint contains, besides an allegation of the supposed offence, that the said *Daniel* did and performed certain labours on sunday, or Lord's day, (not of necessity or charity) for which, if it is against any law of this commonwealth, a specific pecuniary penalty is provided and

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appropriated by law, an allegation of another supposed offence or trespass in throwing down a fence, and a charge of other wrongs and injuries not described in said complaint, upon all which several allegations the general verdict of guilty is returned as aforesaid; and upon such distinct matters so joined in said complaint, and found by said verdict, the court here can never be informed what penalty has been incurred by the said *Daniel*, to what use the same should be appropriated, or what legal sentence the court here can pass upon him.

This motion was strenuously supported by *Thayer* of counsel for the defendant, and opposed by the late *attorney general, Sullivan*, September term, 1806, and the cause stood continued for advisement until this term, when the opinion of the court was delivered by

PARSONS, C. J. This prosecution was commenced before a justice of the peace against the defendant upon the statute of 1791, c. 58. and on the additional statute of 1796, c. 88. to recover a penalty therein provided.

By the first statute it is enacted that no person shall travel,—or shall upon land or water do any manner of labour, business or work on the Lord's day, (works of necessity and charity excepted) on a penalty not exceeding twenty shillings, nor less than ten shillings, for every offence: and that the Lord's day shall extend from the midnight preceding to the sun-setting of that day.

By the additional statute these penalties are raised so as not to be more than six dollars sixty-six cents, nor less than four dollars; and one moiety is given to the town in which the offence is committed, and the other to the informer, who may recover the same with costs before a justice; or the penalties may be recovered for the use of the town by presentment at the sessions, whose jurisdiction has been since transferred to the common pleas.

The defendant, to support his motion, contends that the complaint is insufficient for the commonwealth to have judgment.

If the statutes had authorized a proceeding by information in any court of record for the recovery of the penalty, and the information had been drawn like this complaint, it is very

clear that such information would have been bad. Because there is no allegation of the sum of money forfeited, nor of the share which the informer claims. For an information resembles, not only an indictment in the correct and technical description of the offence, but also an action *qui tam*, in which the informer must shew the forfeiture and its appropriation, or at least the proportion given him by the statute(1).

But the remedy pursued in this case is a summary proceeding before a justice, in which the court will see that the fact charged is strictly within the statute, and that the proceedings are conformable to it. But a rigid adherence to forms will not be required(2).

The substantial part of the complaint is the description of the offence. And the complaint charges that the defendant did, &c. [*Here his honor recited the complaint, as before inserted.*] This we consider as a sufficient description of an offence against the first section of the first statute, although there are words of surplusage, which had been better omitted: but they do not render the charge uncertain or incomplete.

There are several objections made to the form of the complaint.

There is no conclusion against the form of the statutes in such case provided. The conclusion is "against the statutes enacted for the due observation of the Lord's day." Upon examining the titles of the several statutes, we are satisfied that the conclusion in the complaint, though not technically formal, is sufficiently certain, as the defendant must as certainly know the offence, with which he is charged, and the statutes he is alleged to have broken, as if the conclusion had been in the usual form.

Another exception is that the complaint does not set forth on what part of the Lord's day the work or labour was done. It appears that the statute has defined the time which is intended to be considered as the Lord's day. It is, therefore regular to allege the fact on the Lord's day generally, and if by the testimony it was proved to have been done at any time

(1) *Pie* vs. *Westly*, *Hob.* 245.
(2) *Rex* vs. *Chandler*, *Salk.* 378.

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not therein considered as the Lord's day, the defendant must have been acquitted.

The exception which has the most weight is, that the complainant neither shews on whose behalf he complains, nor what the defendant has forfeited by the offence, nor consequently how the statute has appropriated the forfeiture.

To an information *qui tam* at common law, this exception would be fatal. But some indulgence is due to these summary proceedings. In looking into the entries, the precedents of convictions are found liable to the same exception. There are four in *Tremayne's pleas of the crown*, p. 326—329, and some in *Wentworths system of pleading*, vol. 6. p. 14—19. There is a form equally exceptionable in 1 *Burr.* 148. *Rex* vs. *Jarvis*, and another in the same book, p. 609, *Rex* vs. *Little*. The former was on the game laws, and the latter on the statute against hawkers and pedlars. Both were removed by the defendants, and in neither was this exception taken. For if the offence be correctly described by an informer, the justice, or on appeal, the sessions, and now the common pleas, is competent to decide an inference purely legal, as what is the forfeiture incurred, and what is its appropriation. Upon the authority of these precedents, it is our opinion that the judgment ought not to be arrested for this exception.

But the defendant, as a further ground for his motion, has argued that this court has no appellate jurisdiction of this cause. And if it has not, certainly we ought not to render judgment on this verdict, but should order the appeal to be dismissed.

The determination of this question must depend on the several statutes relating to this subject. The jurisdiction, which the common pleas has of this cause, was vested in that court by the statute of 1803, c. 154. By the third section of this act, the common pleas are to exercise and perform all the powers, authorities and duties of the court of sessions with certain exceptions which do not include its criminal jurisdiction. And although in this statute no appeal is given from the sentence of the common pleas in criminal suits, yet by a fair construction, that court must hold the original and appellate criminal jurisdiction of the sessions under the same

modifications and limitations, with which it was exercised by the sessions; and if, in this case, had the sentence been given by the sessions, we should have sustained the appeal, the present appeal from the sentence of the common pleas ought to be sustained. And as the statutes of the commonwealth erecting courts and defining their jurisdiction are a revision of the provincial acts enacted for the same purposes, it may be useful to take a view of the ancient statutes.

By the provincial statute of 11 *Will.* 3. c. 1. the court of sessions was erected, its jurisdiction defined, and an appeal given to the superior court, then the supreme judicial court of the province, from any sentence in a matter *originally* heard and tried in the sessions. And an appellate jurisdiction from the sentence of a justice of the peace is also given to the sessions, in which court the order or sentence was to be *final*. These provisions were continued in force until after the ratification of our constitution, and until their subsequent revision: the stile of the courts being changed on the declaration of independence, as they were no longer the courts of the king of *Great-Britain*, It is therefore very clear that such was the policy of the law, that neither this court, nor its predecessor, the superiour court, possessed any appellate jurisdiction over the sessions, except in matters there originally heard and tried, for a period of more than eighty years.

By examining the statutes now in force respecting these subjects, it appears that this court was erected by the statute of 1782, c. 9. which gives to this court jurisdiction of all suits, civil and criminal, regularly brought before it by appeal or otherwise.

By the 14th chapter of the same statute the sessions was erected, with power to hear and determine all matters relative to the conservation of the peace, and the punishment of such offences as are cognizable by it at the common law, or by acts of the legislature. By this act original jurisdiction in criminal matters is given to it, but not any power to correct the proceedings of justices by receiving appeals from their sentences; its appellate and its civil jurisdiction being derived from other statutes. And the third section giving this court appellate jurisdiction from its sentences in crimin.

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al matters, must necessarily be confined to cases, of which that court was by the first section vested with jurisdiction.

An appellate jurisdiction from the sentence of a justice, was not given to the sessions by any act passed after the revolution until the 15th of March, 1784, when the statute of 1783, c. 51. was passed, about two years after the erection of the sessions. This court of sessions, before the passing of this last act, in fact exercised appellate jurisdiction from the sentences of justices; and also a variety of civil jurisdictions, by virtue of provincial acts then in force. Its civil jurisdiction embraced highways and other matters. Its appellate jurisdiction from the sentences of justices in criminal matters was founded on the fifth section of the provincial act of 11 *Will.* 3. c. 1. which section was not revised or repealed until March, 1784. And the appellate jurisdiction derived to the sessions from that section was by the express terms of it to be final.

We are therefore satisfied that this court had no appellate jurisdiction from the sentences of the sessions in criminal matters, not originally heard and tried in that court before the statute of 1783, c. 51. And in our opinion this last statute does not give us this jurisdiction. The third section gives the sessions an appellate jurisdiction from the sentence of a justice in criminal matters, and regulates the manner, in which this jurisdiction may be exercised, when the appellant shall endeavour to defeat it by refusing to enter or prosecute his appeal. And it is true that there is no provision, as in the provincial statute of 11 *Will.* 3. c. 1. that the judgment of the sessions shall be final.

Hence it has been argued that the sessions now had appellate jurisdiction in this case, not by that provincial statute, but by the statute of 1783; that this statute does not direct that this jurisdiction shall be final: and as in the statute erecting the sessions an appeal is given from all sentences, therefore an appeal in this case now lies from the common pleas, the substitute for the sessions.

As an appeal is given in all cases within the original jurisdiction of the sessions, we will allow that if new cases are added to its original jurisdiction, an appeal will lie in such new cases: and if an appeal had been given in all cases within the

appellate jurisdiction of the sessions, and afterwards its appellate jurisdiction is extended to new cases, an appeal will lie in those new cases, becsuse it would be a reasonable presumption that the legislature did not intend that its jurisdiction should in any case be final.

But we are satisfied that where the appellate jurisdiction is final, if it should be afterwards extended to new cases, of these cases also will its jurisdiction be final, unless a different provision be made by law, notwithstanding its original jurisdiction may not be final: And *á fortiori* when a revising statute shall give it an appellate jurisdiction of the same causes, of which by a former statute it had final appellate jurisdiction. And this distinction results from the manifest intent of the legislature, that the exercise of its original jurisdiction may be controuled on appeal; but that the exercise of its jurisdiction in correcting the errors of inferior magistrates should be final. We do not therefore admit the conclusion from the argument, because when the last statute was made, all the appellate jurisdiction of the sessions was then final.

As a further reason we observe, that any jurisdiction vested in any court must be presumed to be uncontroulable by appeal, unless the presumption is repelled by some legal provision. For a right to appeal is a privilege granted to an aggrieved party, which does not involve in it a right further to appeal from the court, to which he has applied for relief from an inferior jurisdiction.

It has been further argued that the legislature, in giving the common pleas appellate jurisdiction from the judgment of a justice in civil actions, expressly provides that no further appeal shall lie(3); but as no such provision is subjoined to the act giving appellate jurisdiction to the sessions, that in the last case the legislature intended to give an appeal after an appeal.

What effect different expressions in two statutes on new subjects would have, cannot be generally determined, as it must depend on the nature of the expressions and of the subjects of the statutes. But in comparing our revised statutes

(3) *Stat.* 1783, *c.* 42. § 6.

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with the provincial acts which were the objects of revision, it is manifest that they proceeded from different pens. In some a precision of language is introduced, not in the former acts, to prevent doubts which never existed in practice, and this has created doubts in other statutes destitute of such precision. To illustrate this observation, a case may be mentioned, which has been decided in this court. The provincial statutes granted to executors and administrators a right to prosecute or defend any personal action, where the testator or intestate died pending the suit. In practice this right was confined to actions, in which the causes of action survived, and there were no doubts. The revising statutes expressly limited this right to personal actions, in which the causes of action survived. Afterwards was passed the statute of 1788, c. 47. which authorized executors and administrators to prosecute or defend a review of any personal action (without expressing any limitation) if the testator or intestate died pending the writ of review. And in the case of *Thayer*, plaintiff in review and original defendant, vs. *Bond*, administrator of *Dudley*(4), in which *Dudley* had recovered judgment in an action for a tort, and died pending the review, the original defendant insisted, that by this statute he could compel the administrator to enter the lists, and again try the cause of his intestate. But the court, confining by construction the provision to personal actions, the causes of which survived, abated the writ of review.

In the present case it may be remarked, that the statute of 9 *Will.* 3, c. 2. which gave justices civil jurisdiction in matters of small value, gave an appeal to the next inferior court, where the cause was to receive a final determination. An appellate jurisdiction from a justice of the peace in civil actions is also recognized by the statute of 11 *Will.* 3, c. 2. Two years afterwards the statute of 13 *Will.* 3, c. 15. was passed, which gave an appellate jurisdiction to the superior court from all judgments of the inferior court, without making any exception whatever. Thus by the letter of this last statute an appeal lay to the superior court in actions, of which the

(4) *Ante Vol.* 3. 296.

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inferior court had appellate jurisdiction. But in no practice no appeal in such actions was allowed from the inferior court; and there was in fact no doubt about the construction. But in the revised statute, by an unnecessary precision, the appeal after an appeal was expressly prohibited. This prohibition was unnecessary, and introduced *ex majori cautelâ;* and no inference ought to be made to affect the construction of the statute of 1783, c. 51.

Upon the whole it is our opinion that by a reasonable construction of the several statutes, provincial and republican, relating to this subject, this court has no appellate jurisdiction of this cause. This opinion does not overturn any existing practice, for this is the first attempt, that is recollected, to defeat the appellate jurisdiction formerly vested in the sessions, and now in the common pleas, by claiming a further appeal to this court. And it gives us much satisfaction that by this construction the present appellate jurisdiction of this court appears to be consonant to ancient usage, to a fair exposition of the acts of the legislature, and to principles of sound legal policy.

Appeal dismissed.

Note. After the opinion of the court was delivered, the *chief justice* observed to the *attorney general* that, the judgment of the court below being by this decision in full force, he might, if he thought fit, there move to have the defendant's body brought in to receive sentence.

THOMAS MELODY, PLAINTIFF IN ERROR,

versus

GEORGE REAB.

In a *qui tam* action for the penalty inflicted by statute 1788, c. 65. for a rescous, the defendant cannot give in evidence the illegality of the distress.—The owner of a close is not obliged to fence but against cattle lawfully in the adjoining ground; and if all his fence be insufficient, yet if cattle do not escape through the insufficient fence, but are turned in, he may lawfully distrain them damage-feasant.

THIS was a writ of error brought to reverse a judgment of the court of common pleas in this county, rendered in an action of debt *qui tam* brought upon the statute of 1788, c. 65.

Melody *vs.* Reab *in error.*

entitled "An act declaring the causes for which cattle may "be impounded, the manner how they shall be proceeded "with in such cases, and for preventing rescue and pound "breach," and originally sued by the plaintiff in error to recover the penalty of forty shillings forfeited by the defendant for committing a rescous. The plaintiff declared that having distrained damage feasant on his lands, *divers* of the cattle and horses of the defendant, and being about to impound them, they were rescued by the defendant from his custody, by reason whercof the forfeiture accrued. The defendant pleaded in bar. In his plea he locates the plaintiff's close, in which the cattle were taken damage feasant, bounding it on two sides on the defendant's own land, on one side upon land of *Lemuel Higgins*, and on the remaining side upon the highway; and he alleges that the plaintiff's fence, where the cattle broke and entered his close, was not a legal and sufficient fence, and therefore the plea concludes that the plaintiff had no right to take and impound the cattle. To this plea there was a general demurrer, which was joined, and thereupon judgment was rendered by the court below that the plea was good. To reverse that judgment is the object of the present suit. The general error was assigned.

The cause was argued by *Bacon* for the plaintiff in error, and *Dewey* for the defendant, at the last September term, and was again spoken to at this term by the same counsel, after which the opinion of the court was delivered by

PARSONS, C. J. who after briefly reciting the declaration and pleadings in the original action, observed that on inspecting the record several questions arose.

1. Is it competent for the original defendant to shew that the cattle were unlawfully distrained, to avoid the forfeiture? In an action of rescous of cattle distrained, the defendant may at common law defend himself by shewing that the distress was without legal cause; because in that case the plaintiff has the cattle unlawfully in his custody at the time of the rescous(1). For the same reason, if the distrainor should waive his writ of rescous, and sue an action of the case to recover

(1) *Co. Lit.* 47 *b.* 160. *b.* 161. *a.*

his damages, the defendant may shew the distress to be unlawful, for the plaintiff would have suffered no injury by the rescous.

If the statute of 1788, c. 65. had created a forfeiture for a rescous, and had given an action of debt to recover it, without making any further provision, the defendant might without doubt have pleaded in bar of the action, that the distress was unlawful. For if the plea had been true, he might legally retake his cattle from the custody of a trespasser.

But by the sixth section of that statute a forfeiture of forty shillings is created for a rescous, to be recovered in an action of debt *qui tam*. A forfeiture of five pounds is also created for a pound breach, to be recovered in the same manner. And in the case of rescous the party injured may recover his damages by action of the case; and in case of pound breach he may recover double damages by the same form of action. But it is provided that in this last action, as well as in an action to recover damages for a rescous, the defendant shall not be allowed to give in evidence the illegality of the distress, to prevent the plaintiff from recovering his full damages. This provision the plaintiff in error would, by an equitable construction of the statute, extend to the popular action of debt *qui tam* to recover the forfeiture incurred by a rescous.

This, it is our opinion, cannot be done. Penal statutes must be construed strictly according to the intention of the legislature, as discovered by the import of the words; and when not remedial, are not to be extended by equitable principles. Further, statutes are not to be construed as taking away a common law right, unless the intention is manifest. Without this provision of the statute, the defendant may plead in this action that the distress was unlawful; and this defence neither the express words, nor any reasonable construction of them have taken away.

This provision when applied to an action of pound breach, is in affirmance of the common law; and probably in a popular action to recover the forfeiture created by this statute for a pound breach, the same rule would be applied at law without the aid of the statute. But by the express words of the stat-

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ute this defence is prohibited only in the actions of the case to recover damages either for a rescous or a pound breach.

2. Another question arising from the record is, whether the allegations in the defendant's bar, and which are admitted to be true by the plaintiff's demurrer, are sufficient to shew that the distress was unlawful. It is alleged that the plaintiff's fence was insufficient, and thence it is concluded that the distress was not damage feasant. But is this conclusion just? the owner of a close is not obliged to fence, but against the escape of cattle lawfully in the adjoining ground. If all his fence be insufficient, yet if the cattle do not escape into his close through the insufficient fence, but are turned in, he may lawfully distrain them damage feasant. This is evident, not only from the form of a plea in bar *by enclosures*, whether it be pleaded to an action of trespass, or to an avowry for damage feasant in replevin(2); but from the fifth section of the statute, on which this action is founded. But the plea in this case does not allege that the cattle escaped into the plaintiff's close through the insufficiency of his fence. The plea therefore appears to be bad and insufficient, and the judgment must be reversed.

(2) *Vide Rast.* 561. *a.* 620. 1.

THOMAS B. ROBBINS, PLAINTIFF IN ERROR,

versus

CONSTANT LUCE.

To an action on a promise to deliver certain specific articles at a given day and place, it is a good bar that the defendant was ready at the day and place to deliver the articles.

THIS was a writ of error brought to reverse a judgment of the court of common pleas of this county, rendered in an action sued by the plaintiff in error against the defendant, for not delivering him twenty-seven Ash Barrels, agreeably to the defendant's promissory note in writing.

The defendant by his plea in bar, admitted the making of the note, but he alleged that it was given in consideration of a waggon which he then bought of the plaintiff, and further states that it was at the same time agreed between them, that if the said *R.* should call for said barrels before the said 20th day of September, [the day of payment fixed by the note]

he, the said *L.* should deliver them if he had them on hand: and that if the said *R.* should not call for said barrels before, nor at the said time of payment, the said *L.* should not make an actual tender and delivery of the said barrels, but that if he should, on the said 20th day of September, have at his dwelling house the said twenty-seven barrels ready to deliver the same whenever he the said *R.* should call therefor, in that case the said *R.* would call for the said barrels and take them in payment of said note, as he should find it convenient; and the defendant avers that at the time of making the note he offered to deliver to the said *R.* the said barrels, and has always since, and particularly on the said 20th of September, had and still has the said barrels at his dwelling house ready to deliver to said *R.* whenever he should or shall call for them.

To this plea in bar the plaintiff demurred specially, assigning as a cause of demurrer, that the defendant had by his bar attempted to introduce parole evidence, substantially to vary and annul a written agreement. The defendant joined in demurrer, and the court of common pleas gave judgment that his plea in bar was good and sufficient.

The error relied on by the plaintiff in error, is substantially the same as the cause of his demurrer to the defendant's plea in bar. And this point was argued at some length by *Dewey* for the plaintiff in error, and *Williams* for the defendant in error, at the September term, 1806.—The cause has stood continued for advisement from that time to the present; and now *the chief justice* observed that it was unnecessary in this case to decide whether the parole evidence stated in the bar was or was not sufficient in law to prove the allegations intended to be supported by it: for in looking into the record, it appears that the plaintiff has declared on a contract of the defendant's, by which he promised to deliver at his dwelling house 27 ash barrels, on the twentieth day of September, 1804. The defendant, in his bar, among other allegations, avers that on that day at his dwelling house he was ready to deliver the same barrels to the plaintiff. If he had also averred that the plaintiff was not there to receive them, this plea, if true, would have been a good bar, and

Robbins
vs.
Luce
in error.

pleaded in good form. By the contract declared on he was to deliver them at no other time or place. He could not tender them, unless the plaintiff was there. He had done all that he could do; and it was owing to the plaintiff's laches that the contract, as written, was not performed. As neither duplicity in pleading, nor any defect of form is assigned as a special cause of demurrer, the bar appears to be good. A material fact is alleged, which the plaintiff might have traversed: and if the defendant had not the barrels ready; or if the plaintiff had been present to recive them, and they were not delivered, the issue must have been found for him. On this ground therefore, without deciding on the admissibility of the parole agreement, we are satisfied that the judgment of the common pleas was right.

Let the judgment be affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF HAMPSHIRE.

SEPTEMBER TERM, 1808.

AT NORTHAMPTON.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK, HON. SAMUEL SEWALL, HON. ISAAC PARKER, } JUSTICES.

COMMONWEALTH *versus* CHESTER ALDERMAN.

A conviction by a justice of the peace, on the information of a party guilty of a breach of the peace is no bar to an indictment for the same offence.

THE defendant being arraigned on an indictment for an assault and battery, and being enquired of by the clerk whether he was guilty or not guilty, said that he was guilty, but added that he had himself informed a justice of the peace for the county of his offence, by whom he had been sentenced to pay a fine, &c.

The court directed the clerk to enter the plea of guilty alone, observing that it had heretofore been solemnly determined that a conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself, was no bar to an indictment by the grand jury for the same offence.

EBENEZER SLAYTON

versus

THE INHABITANTS OF CHESTER.

When a writ is returned by an officer as duly served, the defendant is estopped from denying the service.—And the court will *ex officio* take notice of the return.

THE writ on which this action was founded, bore date April 6, 1808, and was returnable at the term of the common pleas then next, *viz.* on the third Monday in May.

The return of the officer was as follows, "*Hampshire, ss.* April 14, 1808. By virtue of this writ I summoned the inhabitants of *Chester* by reading to them the within in their hearing; and I gave a copy of the within to *Sylvester Emmons, Esq.* one of the principal inhabitants of *Chester* for their appearance as the law directs.

Newcomb Cleveland, Dep. Sheriff."

"And the said inhabitants come, &c. and pray judgment if they ought to be held to answer to said *Slayton's* writ aforesaid, because they say that a copy of the said writ was not left with the clerk of said town of *Chester*, or with one or more of the principal inhabitants thereof thirty days before the day of the sitting of the court, into which the same was returnable: and this the said inhabitants are ready to verify: wherefore they pray judgment of the said writ, and that the same may be quashed, and for their costs."

To this plea in abatement the plaintiff demurred, and assigned the following causes of demurrer. "1. Because the said inhabitants, in their said plea, do not pray judgment if they shall be held to answer to the said writ of the said *Ebenezer*. 2. Because the said inhabitants in their said plea do not allege that no copy of said writ was left with the clerk of said town of *Chester*, or with one or more of the principal inhabitants thereof thirty days before the sitting of the court into which the same writ was returnable by the said *N. C.* who served the same writ, and has made his return thereon. 3. Because it appears by the said writ and the return thereon, that a copy of the same was left with one of the principal inhabitants of *Chester* thirty days before, &c. and the said inhabitants ought to be estopped from averring that no copy was left with one of the said principal inhabitants. 4. Because the said plea is uncertain and informal."

Slayton *vs.* Inhabitants of Chester

The defendants joined in demurrer. And the opinion of the court was delivered by

PARSONS, C. J. In this action the defendants pray judgment if they ought to be held to answer the plaintiff's writ because they say that a copy of it was not left with the clerk or with one of the principal inhabitants of the town, wherefore they pray judgment of the writ that it may be quashed. To this plea in abatement there is a demurrer for cause; and one of the causes is that it appears from the return endorsed on the writ, that a copy of it was left with one of the principal inhabitants of *Chester*, and that the defendants are estopped from denying it. And this demurrer has been joined.

It is very clear that when a writ appears by the return endorsed by the officer to have been legally served, that the defendant cannot plead in abatement of the writ, by alleging matter repugnant to the return: if the return be false, his remedy is by an action for a false return against the officer.

But it is objected that the return is no part of the plaintiff's demurrer, and that the court cannot *ex officio* take notice of it.—Regularly the plaintiff ought to have prayed oyer of the return before he demurred, and then no doubt could have arisen upon the plea, as it would without question have been bad. If the estoppel had been by matter of record in another court or in another cause in this court, the objection must have prevailed. But as the record relied on as an estoppel is a return on the same writ, against which the plea is pleaded, we are satisfied that we can *ex officio* take notice of it, as in fact if we read the writ, we cannot avoid noticing the return, unless we wilfully shut our eyes: for it of course is written on the same page which contains the endorsement of the writ by the plaintiff, and which is a part of it. As we notice the return, the plaintiff is estopped from making the allegation of want of service, and the plea must be holden bad, and an interlocutory judgment be entered, that the defendant answer further.

Let the clerk enter the judgment specially after this form.

"Whereupon the court here having inspected the same writ and the return endorsed thereon by *Newcomb Cleveland*, a deputy sheriff to whom the writ is directed; which return is in the words following, [*Here let the return be inserted*] it

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appears to the court that the same plea, and the matters therein contained are bad and insufficient in law to abate the said writ: it is therefore considered &c. [*in the usual form of a respondeas ouster.*"]

Bliss for the plaintiff

Ashmun for the defendants.

HENRY MELLEN AND AL. *versus* WILLIAM BALDWIN.

The action of replevin survives the death of the plaintiff, but not of the defendant

THIS was a replevin of two horses sued against *Baldwin* who is named in the writ a deputy sheriff for the county of *Hampshire*, and who, it was agreed, had attached them in an action against other parties than the present plaintiffs.

September term, 1807, the death of the defendant being suggested on the record, *John Baldwin*, administrator of the estate of the deceased, moved the court that he might be admitted to take upon him the defence of this action.

Bliss, in support of the motion, relied on the general provision of the statute of 1783, c. 32. § 10. by which the executor or administrator of any party to an action dying while it is pending is authorized to prosecute or defend such action in case the cause of action doth by law survive. And that the cause of action survives, he cited the case of *Wheatly* vs. *Land*, 1 *Saund.* 216. note 1. *Bliss* also cited as in point statute 1805, c. 99. § 2. which enacts that "actions for the malfeazance or misfeazance of any sheriff, or of any of his his deputies, may be sued against the executors or administrators of such sheriff, in the same manner as if the cause of such action survived against the executor or administrator at the common law."

Ashmun insisted that this was an action which could not survive against executors or administrators, as it was wholly founded on a tort charged to be done by the deceased: and he contended that the provision of the statute of 1805, can by no fair construction be extended to this case. That pro-

vision relates wholly to actions against *the sheriff*, and not to actions against his deputies.

The cause stood continued for advisement, and now at this term the opinion of the court was delivered to the following effect by

PARSONS, C. J. It appears from the writ, and the suggestion on the record which is admitted, that the plaintiffs had replevied the chattels described in the writ from the possession of the original defendant, who had attached them at the suit of a creditor as the property of his debtor, who was not either of the plaintiffs. It further appears that, pending the suit, the original defendant who is described in the writ as a deputy sheriff, died, and that *John Baldwin*, the administrator of his estate, comes into court and moves to be admitted to defend this action. The motion is objected to by the plaintiffs; and whether it ought or ought not to prevail, is the question before the court.

At common law all personal actions died with the party: but by the statute of 1783, c. 32. § 10. provision is made that when either party dies pending the suit, his executor or administrator may come into court, and prosecute or defend it, if the cause of action doth by law survive. And the counsel for the administrator has argued that the cause of action in this case doth survive.

In replevin the ground of action for the plaintiff is his property either general or special, and a tortious violation of his right of property by the defendant. The defendant is therefore charged with a tort, which cannot survive against his executor or administrator.

By the surviving of the cause of action is to be understood of such a cause as will enable the executor or administrator of the deceased to maintain a suit thereon against the survivor, or against his executors or administrators. Thus actions on contracts may be maintained by and against the executors and administrators of the original contractors. Trespass *de bonis asportatis*, and trover, and replevin may be commenced and maintained by the executor or administrator of the owner of the goods against a tort-feazor, but not against his executor or administrator.

Mellen & al. vs. Baldwin.

In the present case the plaintiffs could not maintain any action against the administrator of the deceased defendant for a tort committed by the latter in wrongfully taking these goods. We are therefore satisfied that the plaintiffs could not compel the administrator to take the defence of this suit upon him, so that they might recover damages against the estate of his intestate, for a wrong committed by him when living.

And if the administrator could not be compelled to take on him the defence, neither can he be admitted on his own motion; for his right must depend on the nature of the action, and not on his own consent. And the remedy given by the statute of 1783. c. 32. and enforced by the 59th chapter of the same statute, must be mutual.

But the executor or administrator of a plaintiff in replevin may come in and prosecute, because the chattels of the deceased being vested in him by the law, he might sue a replevin against the defendant, who had unlawfully taken and still held them, and this within the equity of the ancient statute, which gave the executor an action *de bonis asportatis testatoris*.

The counsel for the administrator have further endeavoured to maintain the motion by the statute of 1805. c. 99. which passed after the commencement of this suit. This statute was made to regulate the proceedings upon bonds given by a sheriff for the faithful performance of the duties of his office, and to answer for the mal-feazance of his deputies.

The second section has altered the common law by providing that actions for the mal-feazance of the sheriff or his deputy may be sued against the executors or administrators of the sheriff, in the same manner as if the cause of action survived at the common law.

This section cannot apply to the present motion. For the tort of the sheriff, or of his deputy, is made to survive against the executors or administrators of the sheriff, and not of his deputy: and whether the deputy be living or dead, the sheriff or his executor or administrator is chargeable, and the remedy against the deputy, or if dead, against his executor or administrator is on his bond to indemnify the sheriff. And if we could give this section the construction, for which the counsel for the administrator has argued, yet it could not avail him:

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for the present action is not sued against the original defendant for his misfeazance as a deputy sheriff.

The motion must be overruled, and judgment be entered that the writ is abated by the death of the original defendant.

AUGUSTUS JOHNSON, PLAINTIFF IN ERROR
versus
RUFUS HARVEY.

A writ of error does not lie to reverse a judgment against a defendant out of the commonwealth, because the plaintiff sued out his execution, without giving bond pursuant to the statute 1797, c. 50.

THIS writ of error was brought to reverse a judgment of the court of common pleas, for this county, rendered at January term, A. D. 1800, upon an action of the case in *assumpsit*, wherein the defendant in error was plaintiff, and the plaintiff in error was defendant. The defendant in the original writ was named of *Cambridge*, in the county of *Franklin* and state of *Vermont*. At the first term of the common pleas, when the original writ was returned, it was suggested on the record that the defendant was out of the commonwealth at the time of the service of the original writ, and the action stood continued to the next term, when judgment was rendered against the original defendant by default.

The error assigned, wherefore the said judgment should be reversed was, that the execution issued thereon without any bond having been first given by the said *Harvey* to make restitution of the sum given in damages, when the said *Johnson*, at the time of the service of the original writ in the said action was not an inhabitant or resident within this commonwealth, and was not present within the same from the time of the service of the writ until after the rendition of the judgment aforesaid thereon; and when the said *Harvey* had not caused him, the said *Johnson*, to be notified of such suit previous to the rendition of judgment thereon, as by law he ought to have done before any execution could by law issue on the said judgment.

The defendant in error pleaded *in nullo est erratum*.

Taylor, for the plaintiff in error, cited and relied on the fifth section of the statute of 1797, c. 50. And to shew that

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the irregular issuing of a writ of execution is error, he cites *Fitz. N. B.* 49. 51.—2 *Bacon's Abr.* 189. 229.

The cause was continued *nisi* by consent of the parties for advisement, and at the following March term in *Boston* the opinion of the court was delivered by

PARSONS, C. J. [After stating from the record the proceedings in the original action, and the error assigned,] we are to decide whether or not the judgment for this cause is to be reversed.

By the statute of 1784, c. 28. § 7. if the defendant, having been duly served with the writ, makes default, judgment is to be entered against him, his default being considered as a confession of the cause of action.

By the statute of 1797, c. 50. § 5. if the defendant was out of the state when the writ was served, and did not return before the trial, and had no notice of the suit, a suggestion of his absence must be entered on the record, which the plaintiff at his peril must make, and the court must *ex officio* continue the cause one term. At the next term it is in the discretion of the court, further to continue the cause, or to call the defendant. But if judgment be rendered on default, the plaintiff cannot have his execution, until he has given bond, with one or more sureties, to make such restitution as the defendant may recover on his review of the action sued within one year. And by the statute of 1791, c. 17. § 2. this court may, for any reasonable cause, grant to any party liberty to review the action at any time within three years after the judgment. Upon the second statute the plaintiff in error relies to obtain a reversal of the judgment.

By a writ of error an erroneous judgment on an original writ, or an erroneous award of execution on a judicial writ, may be corrected. Thus error lies on a *scire facias* on a former judgment, or against executors or administrators, or against bail. So error lies to set aside an execution, sued out on a statute merchant or staple acknowledged agreeably to law. And by analogy, error will lie to set aside an execution sued on a recognizance for the payment of a debt taken before a justice of the peace agreeably to the statute of 1782, c. 21.

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But when there is a regular judgment, or a regular award of execution, if an execution after irregularly issue, it cannot be a good cause in a writ of error, to reverse a judgment, or award of execution regularly made. The remedy for the party injured is either by *auditâ querelâ*, or by motion to the court to set the execution aside.

In the present case no objection is made to the judgment, or to any part of the process previous to the rendition of the judgment. The judgment cannot therefore be reversed for the irregularity of suing out the execution: and the plaintiff in error should have sought relief, if aggrieved, in some other way.

It is not the practice in this state to enter on record awards of execution upon original writs, except in particular cases, as against trustees. By law an execution may be sued, tested out of term, and made returnable on a day out of term; and an *alias* or *pluries* may issue tested on any day within a year after the return day of the next preceding execution. If in legal contemplation the first execution is awarded by the court, and if wrongly awarded, the award may be reversed on error. The record should be made up with an award of an execution. And were we to order the clerk below to enter on the record an award of execution, we must presume that he would enter it according to his docket. Then an award of execution would be entered, that the plaintiff have execution on his giving the bond required by the statute. In this case the award would be legal, and the execution might have been set aside for irregularity in suing it out. But if the award should appear on record erroneously entered, if we set it aside on error, we could not reverse the original judgment, which is a distinct and independent part of the record, and may be right, although the award of execution may be wrong.

These principles of law do not impose any hardship on the plaintiff in error. If the execution was levied on his estate, the presumption is strong that he knew of the judgment and execution within a year, as he lives in an adjoining state, when he might have moved to set aside the execution, and might have reviewed the action. The presumption is still

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stronger that he had this knowledge within three years, when this court could have granted a review, if he had suffered by the judgment. But if the execution was not executed, so that a want of notice might be supposed, then the bond required of his creditor by the plaintiff in error would have been useless to him, as there could be no restitution, where nothing had been taken.

The judgment must be affirmed with costs.

After pronouncing the opinion of the court, *the chief justice* observed that an execution in this case ought not to have issued before bond was given. The issuing it was irregular, and the clerk should have been more attentive. If it was procured by the contrivance of the plaintiff's attorney, he ought to have known better; and if he did not, it was malpractice.

I. Phelps for the defendant in error.

THE INHABITANTS OF WEST SPRINGFIELD
versus
THE INHABITANTS OF GRANVILLE.

An inhabitant of a town living in a part of it, which by an act of incorporation is formed into a new town, and not having a settlement in the old town, gains none by such incorporation.

THIS was *assumpsit* for meat, drink, &c. furnished to *Jabez Dunham* and his wife, alleged by the plaintiffs to be paupers, having their legal settlement in *Granville*. The cause came before the court upon a case stated by the parties, in which the only question submitted was whether the paupers were settled or not in *Granville*. The facts, as far as they are material to the question, will appear in the following opinion of the court.

PARSONS, C. J. The paupers having lived in *Granville* from April, 1760, to April, 1769, without having been warned to depart agreeably to the provincial statutes in force before the act of 7 *Geo.* 3. c. 3. were unquestionably once settled in *Granville*. By the act last referred to, no person could, after the tenth of April, 1767, gain a settlement by a residence for any length of time in any town without the approbation of the inhabitants given in town

meeting. And this statute remained unrepealed until the passing of the statute 1789, c. 14.

The settlement of the paupers being once in *Granville*, we have enquired whether a new settlement has been since acquired within the state. In 1769, the paupers removed to *Westfield*, and lived three years in that part of it, which in November, 1770, was incorporated by the name of *Southwick*. They had not the approbation of either of the towns of *Westfield* or *Southwick*; and if they gained a setlement in *Southwick*, it was in consequence of their being inhabitants there when it was incorporated.

It has been decided that, when an old town is divided into two towns, all the inhabitants at the time of the incorporation having settlements there become settled in the towns, respectively, within the limits of which they lived at the time of the incorporation: and that an inhabitant not settled there gains no new settlement by the incorporation.

Upon this ground the paupers, although inhabitants of *Westfield*, yet not having settlements there, acquired no settlement in *Southwick;* and consequently their settlement in *Granville* remained. In 1772, the paupers removed from *Southwick*, but as it is agreed that they had no new settlement within the state after they left that town, it is unnecessary to follow them in their peregrinations. Having been once seetled in *Granville*, and having since acquired no new settlement, the plaintiffs must have judgment.

Let judgment be entered by the consent of the parties for the plaintiffs, for fifty-six dollars damage with costs of suit.

Bliss for the plaintiffs.

Phelps for the defendants.

MOSES BLISS AND GEORGE BLISS
versus
MATTHEW THOMPSON.

One is a competent witness for a plaintiff although he has a similar action pending against the same defendant arising out of the same transaction.

An implied promise to pay money received by the defendant for a release to A. by the plaintiff, of a warranty of lands is not a contract concerning lands within the statute of frauds

The maxim that a party shall not be received to aver against his own deed does not apply to the case of a deed obtained by fraud.

The common law requires good faith in all contracts, and where one overreaches another by false allegations or fraudulently concealments, the law will compel him to pay over the money obtained by such means to the party, to whom in equity and good conscience it belongs.

THIS was an action of *indebitatus assumpsit* for money had and received.

Upon the general issue being pleaded, the cause was tried at an adjourned session of the court in December last before *Sedgwick, J.* and a verdict found for the plaintiffs subject to the opinion of the court on the evidence filed in the case and reported by the judge, from which the following facts appear.

The plaintiffs, the defendant, *William Ely*, and certain other persons were tenants in common in fee, in different proportions of a large tract of land in the state of *Kentucky*, purchased by the agency of the said *Ely*, of *William Alexander*. The purchase was secured by the assignment of the warranty of *Richard Gernon*. It was afterwards known that there were prior claims to a part of the land, and that the remaining part was of an inferior quality, there being no timber on it; and the principal reliance of the purchasers to relieve themselves against a bad bargain was on the warranty of *Gernon*. The defendant, having purchased the shares of most of the proprietors, had himself, with the agency of *William Austin*, agreed with *Gernon* to procure for him from the partners a release of his warranty for 8000 dollars of which *Austin* was to have 2000 dollars. The defendant concealing his transaction with *Gernon*, applied to the plaintiffs to purchase their share, under the pretence that nothing could be obtained from the original purchase, but by immediately proceeding to *Kentucky*, and saving some part of the purchase money by selling the land for the most it would bring; that *Gernon's* warranty was worth nothing, as he was unable to pay any thing, and that he was intending to proceed to the south of *France*, whence he had emigrated. The plaintiffs were then ignorant of *Austin's* connection with the defendant, and of his concern in the contract

with *Gernon*. The information given by the defendant, and written by his agent *Austin*, was wholly false, and by them known to be so, and was communicated by them with the intention of deceiving the plaintiffs; who giving credit to the representations and information given them by the defendant, sold to him their interest in the purchase, secured by *Gernon's* warranty, for a sum of money much less than their proportion of the money paid by *Gernon*, to procure a release of his warranty. The said *Ely* was treated in the same manner by the defendant; and under the same impression, and with the same confidence that the defendant had given the plaintiffs, being present during the negotiation, he likewise sold his share to the defendant for the same price, and the plaintiffs and *Ely* conveyed their shares to the defendant by the same indenture. These facts were principally proved by the deposition of Mr. *Ely*, the admission of which was objected to at the trial by the defendant, and because that objection was overruled, the defendant moved for a new trial.

In support of this motion, it was argued that Mr. *Ely* holding under the same deed with the plaintiffs, and having a similar action pending against the defendant on the same grounds, was too closely united in interest with the plaintiffs to be received as a competent witness. It was true their estates in the land were several, but the receipt of the money from the defendant was joint, as was the release to *Gernon*. If they had joined in the action, as it was insisted they might and ought to have done, they could not thus have been witnesses for each other.

It was further contended that this action was not maintainable upon the evidence in the case, for that *Gernon's* warranty was a covenant real running with the land, and the plaintiff's demand is thus within the statute of frauds, as being on a contract concerning lands, and so ought to be supported by some written memorandum signed by the party to be charged therewith.

It was also said that the plaintiffs, having by their deed acknowledged full satisfaction for their release, were estopped to say that no sufficient consideration waspaid, or that fraud was used in the transaction.

Bliss & al. *vs.* Thompson.

But it was more strongly insisted that the facts disclosed no moral or even legal fraud. If the defendant was better informed of the quality of the land, of the goodness of the title to it, and of *Gernon's* ability than the plaintiffs were, he had a right to avail himself of such superior knowledge. He received the money from *Gernon* to procure a release to him from the several claimants under his covenant of warranty, and he had a right to make the best bargain he could with each of them. He was bound by no rule of honesty or fairness to give to the plaintiffs information, which would enhance their demand, and which they were equally able and obliged to procure for themselves. A circumstance in the case absolutely protects the defendant against the imputation of fraud; he offered to sell his claim to the plaintiffs for the same sum, which he offered them for theirs.

Before the plaintiffs' counsel made any observations on the motion, a suggestion dropped from the court that they need not labour to shew that a gross fraud had been committed, but how far the plaintiffs could be relieved in this action.

Ashmun, for the plaintiffs observed, that it had lately been much the practice to extend the benefit of this action to every case where one held money, which in equity and good conscience he was bound to pay over to another. In this case the plaintiffs were deprived of their money by a gross fraud. Not only was there a false affirmation, but *Austin's* letter was in nature of a false token. They respected facts which were peculiarly within the defendant's knowledge, and which on every principle of good faith he was bound to disclose.

But even agreeing there was no fraud in this case, yet it is contended that this money was received by the defendant for the use of the plaintiffs whenever they should by their act and deed confirm the release to *Gernon*, or enable the defendant to do it for them, which their deed to the latter certainly did,

The opinion of the court was afterwards delivered by

PARSONS, C. J. [After stating the facts from the evidence reported.] It appears that *Ely*, though objected to, was admitted as a witness, and that agreeably to the direction of the judge a verdict was found for the plaintiffs for the difference between the money paid them by the defendant

for the release, and the money received by him of *Gernon*, to extinguish his warranty on the shares belonging to the plaintiffs.

The admission of *Ely* is now objected to as a sufficient cause for setting aside the verdict. *Ely's* testimony was certainly very material for the plaintiffs; and if it was improperly admitted, the verdict ought to be set aside. The objection to him is founded on his connection with the plaintiffs in the same transaction; that for the same supposed fraud he has commenced his action; and if he can be a witness for the plaintiffs, they will be witnesses for him.

An objection of this nature may very properly be made to a jury, to the credit of a witness, who will decide what weight is due to his testimony: but no objection on account of interest can exclude a witness, unless he be interested in the event of the suit. In this action *Ely* had no such interest; and the verdict cannot be given in evidence for or against him in any action, in which he may be a party. And although his demand may arise out of the same transaction, this case cannot be stronger than that of an action against one underwriter on a policy of insurance, in which another underwriter on the same policy may be a witness for the defendant. We therefore think that *Ely* was a competent witness, and that the judge did right in permitting his testimony to be laid before the jury.

Several objections have been made to the verdict. It has been urged that the assignment of *Gernon's* warranty, which ran with the land, must be considered as an assignment of land, and therefore that the plaintiffs' demand is within the statute of frauds, and so could not be supported by parole evidence, but only on a written memorandum made by the defendant.

Without controverting the position, that a contract to release a covenant of warranty annexed to land is a contract concerning some interest in land, yet in this case the objection cannot prevail. For the action is not brought on any agreement made by the defendant with the plaintiffs concerning the sale of any interest in land, but for money he had in equity received from *Gernon* for their use, by reason of their having extinguished the interest they had in *Gernon's* warranty.

Bliss & al. vs. Thomson.

Another objection is that the release to the defendant by the plaintiffs being by deed, they cannot aver that it was obtained by fraud against their own deed, which expresses a sufficient and fair consideration.

It is generally true that a man shall not be received to aver against his own deed. But the case of fraud is always excepted, which vitiates every transaction: and a deed obtained by fraud is to be considered as a void contract as to the fraudulent party.

But the great objection, and the one most relied on is, that the transaction, considered in all its parts, is not in law fraudulent: that the defendant had a legal right to make his bargain for his own benefit with *Gernon* to procure a release of his warranty, and that he might lawfully conceal it from his partners in interest.

Not only good morals, but the common law requires good faith, and that every man in his contracts should act with common honesty, without overreaching his neighbour by false allegations or fraudulent concealments.

Let us now look at this transaction. From the evidence reported it was competent for the jury to infer that the defendant was a partner in interest, with the plaintiffs and others, in *Gernon's* warranty: that *as a partner* he proposed terms to *Gernon* to discharge his warranty: that he was to receive 8000 dollars on procuring the discharge: that he concealed this negotiation, and falsely affirmed that the warranty was worth nothing, and fraudulently produced *Austin's* letter written for this purpose, to give credit to his affirmation: and that the plaintiffs, imposed on in this manner, executed this release, by which the defendant was enabled to fulfil his contract with *Gernon*, by extinguishing the plaintiffs' interest in the warranty.

As the jury might make these inferences from the evidence, we must presume that they did make them, as they have found a verdict for the plaintiffs.

On this view of the case we are satisfied that the transaction between the parties is vitiated by fraud on the part of the defendant, and will not protect him in holding the money he received from *Gernon*, in consideration of the plaintiffs' having released their interest in the warranty. Here is not

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only the suppression of the truth, but also an allegation of falsehood, to deprive the plaintiffs of their interest in the warranty.

It appears that the jury deducted, from the plaintiffs' proportion of the money paid by *Gernon* to the defendant, the sum he had paid the plaintiffs for their release. This deduction we think was right, as the effect is to give to the plaintiffs so much of the money received from *Gernon* by the defendant, as he against equity and good conscience detained from the plaintiffs. Upon the whole we do not find any good reason to set aside the verdict; and judgment must be entered upon it for the plaintiffs.

Hooker and *J. Dwight* for the defendant.

THE INHABITANTS OF SPRINGFIELD
versus
THE INHABITANTS OF WILBRAHAM.

Upon a father's gaining a new settlement, a child of full age voluntarily living with him does not gain such new settlement within the statute of 1793, c. 34. § 2. *Art.* 2.

THIS was *assumpsit* for the charges of maintaining *Sarah Colton*, whom the plaintiffs alleged to have her legal settlement in *Wilbraham*. The parties made a statement of facts for the opinion of the court, in which it was agreed, that *Stephen Colton* the father of the pauper, and also the pauper were once settled in *Wilbraham*, the settlement of the pauper being derived from her father: that in November, 1787, the said *Stephen* with his daughter, who was then near thirty years of age and living with him, removed to a farm in *Monson* of more than three pounds annual income, of which he was seized in fee: that he continued to live hereon, and in the occupation of it for more than two years after the 23d day of June, 1789: that the daughter usually lived with her father as a part of his family, labouring for him without compensation: but that within the same two years she at several times for the space of two weeks engaged herself, and worked for other persons, returning at the end of each week to her father's house, to change her apparel, which was kept in a trunk there.

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It was further agreed that so far as respects this action, the said *Stephen* gained a settlement in *Monson:* that neither he nor the said *Sarah* have gained any legal settlement since that time in any town within this commonwealth: that the plaintiffs had expended the sum demanded in this action, *viz.* 51 dollars 99 cents, in the necessary support of the pauper: and that neither she, nor any of her kindred within the degrees prescribed by the statute in that behalf are able to pay for such support.

If upon these facts the court should be of opinion that the said *Sarah* was legally settled in the town of *Wilbraham*, judgment to be rendered for the plaintiffs for the said sum in damages with costs: otherwise the defendants to recover their costs.

Ashmun, of counsel for the defendants, being called on by the court, contended that all legitimate children, by virtue of our statutes of 1789, c. 14. and 1793, c. 34. of whatever age they may be, follow the settlement of their father until they gain one for themselves. There may be necessary exceptions to the rule thus generally laid down, but the coming of age is not one. And hence he insisted that the pauper had a settlement in *Monson* derived from her father.

Ashmun cited the cases of *Rex* vs. *Offchurch*(1), *Rex* vs. *Witton cum Twambrookes*(2), *Rex* vs. *Everton*(3). *Rex* vs. *Sowerby*(4), as bearing on the question arising on the facts in this cause, but he observed that he had expected originally to have maintained the defence on other grounds, which had been since found not to be tenable.

The cause was continued *nisi* for advisement, and at the next March term in *Suffolk*, the opinion of the court was delivered by

PARSONS, C. J. [After reciting the facts as before stationed.] It is very properly admitted by the parties that the father gained a settlement in *Monson*. This point

(1) 3 *Term R.* 114.
(2) *Ibid.* 355.
(3) 1 *East.* 526.
(4) 2 *East.* 276.

came before the court in the case of *Salem* vs. *Andover* [*Ante Vol.* 3. 436.] and it was held that the occupation by any citizen of his freehold of the annual income of three pounds, and situate in the town in which the owner resides for two years after the statute of 1789, c. 14. which was passed June 23d, in that year, gains a settlement by such occupation and residence, notwithstanding the subsequent repeal of that statute by the statute of 1793, c. 34.

The defendants have argued that the pauper gained a derivative settlement in *Monson* with her father, removing and living with him as part of his family, and also relying on the words of the last statute providing for the settlement of legitimate children.

If this question is to be decided on the principles of derivative settlements resulting from the *English* pauper laws, the defendants must fail: for during the two years in which the father was gaining his new settlement in *Monson*, the pauper was not all that time a part of her father's family. Having a right to leave his family, and to work for herself, she in fact exercised that right, although she afterwards returned to her father's house. In the case of *the King* vs. *the inhabitants of Roach*(5), the pauper, then twenty-two years of age, and living with her father, left his house, and lived with another family as a wet nurse for eight weeks at one shilling per week, and then returned to her father's who in the meantime had removed to and gained a settlement in another parish. And it was holden that the leaving her father's house for the purpose of seeking her own livelihood was an emancipation, and that the time of absence was immaterial.

The words of the statute of 1793, c. 34. are "Legitimate "children shall follow and have the settlement of their father, "if he shall have any within this Commonwealth, until they "gain a settlement of their own." If these words are taken literally, then a son of full age, who had left his father, and had become the head and father of his own family, if he had gained no new settlement, would follow any new settlement acquired by his father, after the son had left him. This could

(5) 6 *Term R.* 247.

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never have been the intention of the legislature. The object of this provision was to regulate the derivative settlement of legitimate children, who when emancipated are no longer in a condition to derive a settlement from their father.

Wives and children may have derivative settlements, because the husband and the father have the legal controul of their persons, and the right to their sevices : and the wife cannot be separated from the husband, nor minor children from the father. Upon this same principle slaves, when slavery was tolerated, had a derivative settlement with their master.

But when the father ceases to have any controul over his children, or any right to their service, it is not easy to devise any good reason why they should not be considered as emancipated, and as no longer having a derivative settlement with the father on his acquiring a new settlement. And when the reason ceases, the law founded on that reason also ceases.

In the construction of this clause of the statute we are all of opinion that upon the fathers gaining a new settlement, a child of full age although voluntarily living with him, does not have the new settlement with his father, but his former settlement remains. Whether the cases of a child being *non compos*, or of a son marrying under age, or enlisting as a soldier, by which during the enlistment the father has lost all controul over his person, or right to the profits of his services, are or are not exceptions, may be determined when those cases arise. The present is not one of them.

We find cases in the English reports, where a child of full age living with his father is considered as not emancipated. In those cases the child may be considered as a servant ; and in that country a settlement may be acquired by service : but by our laws no settlement can be gained by service. We are therefore satisfied that the settlement of the pauper was in *Wilbraham*, and that the plaintiffs must have judgment for 51 dollars 99 cents and costs of suit.

Bliss for the plaintiffs.

COMMONWEALTH *versus* JOHN WARD.

THE defendant was brought into court by the keeper of the gaol in this county in obedience to a writ of *habeas corpus cum causa*, which had issued to him on motion returnable *instanter*. From the gaoler's return it appeared that the defendant was committed by a justice of the peace for this county for not finding sureties of the peace.

A *mittimus* or warrant of commitment from a justice of the peace ought to recite the complaint on which it is founded—

A recognizance for keeping the peace should be taken returnable to the next court of common-pleas: and when taken on a charge of a bailable offence, should be made returnable to the next court having jurisdiction of the offence.

The warrant of commitment recites that the defendant had been brought before the justice, and "thereupon required to find sufficient sureties to be bound with him in a recognizance of fifty dollars to keep the peace and be of good behaviour towards all the citizens of the commonwealth, and especially towards *Ezra Sacket*, for and *during the term of two years* from the date" of the warrant: and having refused to find such sureties, the justice committed him until he should find them, or be otherwise discharged by due order of law.

By the court. Here is no complaint recited, which ought always to be done for the information of the court upon a *habeas corpus*. The justice has wholly misconceived his authority. When one is brought before a justice of the peace, on articles of the peace exhibited against him, the justice, if satisfied that there is ground for further proceedings, is to order him to recognize with sureties for his appearance at the next court of common pleas, and in the mean time to keep the peace towards all the citizens, and especially towards the complainant. When one is charged with a bailable offence, and on examination the justice is of opinion that there is sufficient cause, he is to take a recognizance for his appearance at the next court having jurisdiction of the offence charged.

In the present case the prisoner was required to find sureties of the peace for the term of two years, which was altogether beyond the authority of the justice, and the commitment was illegal. Let the prisoner be discharged and go without day.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF WORCESTER,

SEPTEMBER TERM, 1808.

AT WORCESTER.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, HON. ISAAC PARKER, } JUSTICES.

AZARIAH FULLER *versus* SAMUEL HOLDEN.

In an action against a sheriff for not seizing upon execution chattels which he had attached on the original writ, it is a good defence that such chattels were the property of strangers, and not of the debtor.

THE plaintiff declares in case, and alleges that he on the 12th day of May 1803, sued a writ of attachment against one *Benjamin Porter* of *Orange*, in the county of *Hampshire*, returnable to the court of common pleas in this county, to be holden in the following June, and directed to the sheriff of the county of *Hampshire* or his deputy, or the constable of *Orange*: that on the 14th of May he delivered said writ to the defendant, then a constable of *Orange*, to serve and return the same according to law: that the defendant, by virtue of said writ attached two cows, of the value of 25 dollars each, shewn to him by the plaintiff as the property of the said *Porter*, and made return thereof accordingly: that afterwards the plaintiff recovered judgment against the said *Porter*, in the said action: that he afterwards, and within thirty days after the judgment, sued out a writ of execution thereon, and delivered it to the defendant to be duly executed, and requested him to execute and return it according to the precept thereof: that, although the defendant might have found within his pre-

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cinct the cows which he had attached upon the original writ, yet he neglected to levy the said execution thereon, but took the body of *Porter* and committed him to prison upon said execution, stating in his return that the said cows had been rescued out of his possession, one of them by *Hepzibah Johnson*, and the other by *Ebenezer Eddy:* and that *Porter* afterwards took the benefit of the act entitled "An act for the relief of poor prisoners, who are committed by execution for debt:" whereby the plaintiff has lost the benefit of his said attachment, and the whole amount of the debt and costs recovered upon the judgment aforesaid.

Upon the general issue pleaded, the action was tried before *Sedgwick, J.* in this county, April term 1807, and a verdict found for the plaintiff.

At the trial, the defendant, to prove the issue on his part, offered to give evidence that the two cows mentioned in the declaration were, at the time of the attachment, delivery of the execution, and return thereof, the property of the said *Johnson* and *Eddy*, and not the property of *Porter*. The judge refused to admit the evidence: and upon the defendant's offering it again in mitigation of damages, it was again overruled.

The defendant excepted to these decisions of the judge, and moved for a new trial on that ground. The defendant also filed a motion in arrest of judgment, because the plaintiff has not alleged that the defendant's return on the execution was false, fraudulent or improper, nor that the cows mentioned were at any time the property of *Porter*.

The motion for a new trial was spoken to at the last September term in this county, by *Upham* for the defendant, and by *F. Blake* and *A. Bigelow* for the plaintiff.

Upham contended that whatever evidence went to shew that the plaintiff had sustained no damage, would destroy the plaintiff's action, and ought therefore to be received under the general issue of not guilty. Thus in an action for beating the plaintiff's servant, *per quod servitium amisit*, the defendant may give in evidence upon not guilty pleaded, that the plaintiff did not lose his service; for that is the injury

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charged, and denied by the plea of not guilty(1). So in the present case, if the property which the plaintiff had caused to be attached upon his original writ, did not in fact belong to his debtor, he could have derived no benefit to himself from levying his execution upon it, and he has consequently sustained no injury.

But if it should be ruled that this evidence was incompetent to maintain the issue for the defendant, still it is contended that it was proper and pertinent evidence in mitigation of damages. In cases of rescue the defendant may give in evidence, in mitigation of damages, the ability of the person rescued, and that he is still amenable to justice(2). So here the plaintiff has all the remedy against the estate of his debtor which he ever had; and it would be unreasonable that the defendant should be held to answer in damages for the amount of the debt, if he could not take those cows in execution without becoming a trespasser.

For the plaintiff, it was urged that, this matter ought to have been pleaded specially, or at least a brief statement filed of the defence intended to be set up, under the statute of 1792, c. 41. The declaration charged the defendant with neglect of his official duty. When the plaintiff had proved this, he had done all that could be expected from him in a trial upon the general issue. He could not be apprized of this special defence, nor prepared to rebut it.

Under the general issue of *non cepit* in replevin, property cannot be given in evidence, because it ought to be pleaded(3).

The injury complained of in this action is special in its nature. The defendant returned that he had attached certain goods. The plaintiff, induced by this apparent security, was led to prosecute his action; and when he obtains his execution, the officer, who, he presumed, had them in custody, instead of levying it upon these goods, returns that they have been rescued out of his hands, and in one instance by a woman, although he had the whole physical power of the county at command.

(1) *Esp. Dig.* 653. 1 *Wils.* 45. *Bull. N. P.* 78.
(2) *Esp. Dig.* 659. 6 *Mod.* 271.
(3) *Bull. N. P.* 54.

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The cause stood continued for advisement, and now at this term the opinion of the court was delivered by

PARSONS C. J. The plaintiff, in an action of the case, demands damages of the defendant, for the neglect of his duty, as a constable of the town of *Orange*. The substance of the plaintiff's demand is, that having sued out an original writ of attachment against *Benjamin Porter*, his debtor, the defendant, as a constable of *Orange*, by virtue thereof attached two cows shewn to him by the plaintiff as *Porter's* property: that having recovered judgment against *Porter*, within thirty days he delivered his execution to the defendant, to execute; who, regardless of his duty as a constable, and intending to wrong the plaintiff, and deprive him of the benefit of his attachment, neglected to levy the execution on the said cows, or on any other property of *Porter's*, but levied it on his body, and returned that the two cows had been rescued from him, and that for want of property he had arrested *Porter's* body, and had committed him in execution. And the plaintiff further complains that *Porter* was discharged upon taking the insolvent debtor's oath. By reason whereof the plaintiff has lost the benefit of his attachment, and his debt and costs.

The defendant pleaded the general issue, and offered in his defence evidence to prove that the cows, when attached, were not, and never were afterwards the property of *Porter*, but of one *Johnson* and one *Eddy*. This evidence the judge rejected. The defendant then offered the same evidence in mitigation of damages, and the judge again rejected it. For which cause the defendant has filed his exceptions, and moved for a new trial.

It appears to us that the wrong complained of is the defendant's neglect to seize the cows on the execution, to the plaintiff's injury; and we are satisfied that under the general issue, the defendant may prove that he was guilty of no neglect, and that the plaintiff has sustained no injury by his non-feazance. And proof that the cows were not the property of *Porter* when attached nor ever after, would be good evidence that the defendant is in no default, but would have been a trespasser, had he seized the cows. Under this impression, we think the evidence offered was improperly rejected.

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If it had been urged for the plaintiff that, he has not alleged the property of the cows to be in *Porter*, and therefore the property of them was not in issue, it might have been answered, that the plaintiff has suffered no damage whatever by the defendant's conduct, if the cows were not the property of *Porter*, and that the evidence could not injure him. And it may be added, that after a verdict for the plaintiff, the insufficiency of the declaration may be considered as cured by it; for it appears that the plaintiff's title to damages is not in itself defective, but only defectively stated, and that the jury would not have given a verdict for him, unless it had been proved that the property of the cows was in *Porter*.

Upon the whole we are of opinion that the verdict ought to be set aside, and a new trial granted.

The chief justice then observed that, at a conference of the judges, his brother *Sedgwick* had expressed his full concurrence in the opinion that the evidence had been improperly rejected.

PORTER KIMBALL *versus* WILLIAM CUNNINGHAM, JUN.

If one would avoid a sale of exchange of a chattel for fraud practised by the other party to the contract, he must not retain any part of the consideration he received upon the sale or exchange.

TROVER for two steers. Upon not guilty pleaded, the action was tried at an adjournment of the last September term in this county, before *Sedgwick*, *J.*

Upon the trial it was agreed, that the defendant had converted the steers to his own use. To prove the plaintiff's property, it was in evidence that the plaintiff and defendant had agreed to exchange horses; and that the bargain was that the defendant agreed to deliver the steers, and a note of one *Phillips*, together with his own horse to the plaintiff, and was to receive the plaintiff's horse, and to have his own note, which the plaintiff held, delivered up to him; that the bargain was executed, the plaintiff selling his horse as a sound one, and the defendant agreeing to pasture the steers a week for the plaintiff.

The defendant finding the horse he had received was unsound, and having evidence that the plaintiff knew this at the time of the exchange, returned the horse, and refused to deliver the plaintiff the steers. Since the commencement of this action, the defendant had instituted a suit against the plaintiff for selling him an unsound horse as a sound one, and this suit was pending at the time of the trial.

The defendant offered to give in evidence in his defence the plaintiff's fraud in the exchange of the horses, and his having returned the plaintiff's horse, thereby to defeat the plaintiff's property in the steers, which had been given as boot. This evidence was rejected by the judge, and the jury were directed that, if they believed the contract between the parties to be an entire one, and that it was a contract operating, according to the true intention of the parties, as a sale of any of the articles, which were the subjects of it, then the property of the steers was thereby vested in the plaintiff, and he was of course entitled to recover: but if they did believe that the contract was not an entire one, for which, the judge intimated, there seemed to be no evidence; or that if it was entire, yet according to the intention of the parties, executory, then the jury ought to find a verdict for the defendant.

A verdict was rendered for the plaintiff subject to the opinion of the court upon the judge's report; and the action stood continued to this term.

And now *T. Bigelow* for the defendant, moved that the verdict be set aside and a new trial granted.

1. Because the judge rejected evidence which would have proved fraud in the plaintiff, and this being established the party guilty of it loses every right he might otherwise have had under the contract, if the other party will avail himself of it, whether the contract be entire or consist of several and distinct parts, and whether the warranty be express or implied only.

2. The intimation of the judge to the jury that the contract must be taken to be either wholly executed or wholly executory tended to mislead them. A contract may be partly executed and partly executory, and that was the fact here. So far as concerned the steers in question it was executory, the

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defendant not undertaking to deliver them until a week should have elapsed. If in the mean time fraud, or any other circumstance vacating the contract before its execution, as the failure of the consideration, came to the knowledge of the defendant, he had a right to avail himself of it(1).

3. It was wrong to admit evidence of the commencement of the defendant's action against the plaintiff. That action, being posterior to the one now before the court, can have no bearing on the rights of the parties here.

A. Bigelow, for the plaintiff contended, that the defendant must affirm or disaffirm the contract in the whole. He cannot be permitted to affirm one part and disaffirm the remainder. And by bringing his action for the fraud he has elected to affirm the contract. Further, if he would disaffirm the contract, he should have delivered up the plaintiff's note which he held, and have demanded his own horse to be returned to him, neither of which appears in the case.

As to the second objection, *Bigelow* cited 2 *Black. Comm.* 418. but the court sugested that he need not pursue that point.

As to the third objection, he insisted that the evidence was properly left to the jury, and the effect of that evidence was to shew that the defendant had chosen to consider the contract as in force, and of consequence the steers are the property of the plaintiff, and the verdict is right.

F. Blake, on the same side, enforced the arguments of *A. Bigelow*, and cited the case of *Power* vs. *Wells. Cowp.* 818.

The opinion of the court was afterwards delivered by

PARSONS, C. J. [After reciting the report of the judge.] When a horse is sold upon an implied warranty that he is sound, and at the time of the sale the vendor knows that he is not sound, this is such a fraud in him as will render the contract void, at the election of the vendee. If he chooses to consider the contract as void, he must return the horse within a reasonable time, and then he may maintain a general *indebitatus assumpsit* for the purchase money, as money had and received to his use. If he had exchanged horses and given

(1) *Owenson* vs. *Morse*, 7 *Term R.* 64.

money as boot, he may not only maintain that action for his money, but also trover for the horse he parted with in exchange.

But he ought not to retain any part of the consideration he received upon the sale or exchange: as if in the exchange he received money in boot, he ought to return, not only the unsound horse, but also the money he received. For he shall not compel even the fraudulent seller to an action, to recover back the property he has parted with in the exchange. This rule applies only to the case of an *implied* warranty on a fraudulent sale or exchange. But the party defrauded is not obliged to consider the fraudulent contract as void, but may at his option maintain an action of deceit, or a special *assumpsit*, and recover damages (if he has sustained any) for the fraud. If the warranty be *express*, his remedy, either on a fraudulent sale or exchange, must be by an action of deceit or by a special *assumpsit*.

In the present case, the evidence offered was to prove a fraudulent exchange with an implied warranty that the horse was sound, when the vendor knew that he was unsound. The defendant had therefore his option to consider the bargain void. If he chose so to consider it, he ought to have returned all the property that he received on executing the contract. He ought to have returned the horse, and his own note that was delivered up to him by the plaintiff; or if cancelled, the money to pay it. Had this been done, we are satisfied that he might have maintained trover for his horse, and for *Phillip's* note, which he delivered to the plaintiff, and the plaintiff's property in the steers would have been disannulled.

But in fact he still has the benefit of the note, which the plaintiff delivered him, to which he can have no claim, if the contract be void. For this reason we are satisfied that he cannot defend himself in this action upon the ground that the exchange was void.

There is another important fact stated: that after he returned the unsound horse, he commenced an action of deceit against the plaintiff, to recover damages for the fraud, which action is still pending; and not an action of trover for his

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horse, which he had delivered the plaintiff. By this action it is also very clear that he has made his election to consider the contract as subsisting and to recover damages for the breach of it. And if the contract be considered as subsisting, the plaintiff's property in the steers is not annulled, and the evidence was very properly rejected.

The verdict must stand, and judgment be entered accordingly.

STEPHEN TOURTELOT, LIBELLANT *versus* ANNA TOURTELOT.

Where a libel for a divorce *a vinculo* alleges a fact of adultery on one day, the court will permit an amendment charging the fact on another day; and in such case the respondent will be entitled to a continuance.

THIS was a libel for a divorce *a vinculo* for the cause of adultery, and it alleged the fact of adultery with a particular person on a day certain.

Adams, for the libellant, suggested that the witness, on whom he had relied for proof of the fact alleged, had died since the libel was filed; and he moved for leave to amend the libel by stating another act of adultery with the same person on another day.

The court granted the motion, saying that the respondent would be entitled to a continuance, if she was not prepared to defend herself against the new allegation.

ZURVIAH WILLARD LIBELLANT, *versus* JOSHUA WILLARD.

A libel by a *feme covert* for a divorce must be subscribed by herself, and not by an attorney.

THE libel in this case was for a divorce *a vinculo*, and was subscribed by one naming himself attorney to the libellant.

The court objected to this practice, observing that there was no evidence that the supposed libellant had any knowledge of the filing of the libel in her name.

A. Bigelow said he had a witness in court, by whom he should prove that the libel was made and prosecuted by direction of the libellant. Whereupon the court sustained the libel, but cautioned the bar against such a practice in future.

JOSIAH PEASE, JUN. *versus* EPHRAIM WHITNEY AND AL.

In this case a verdict had been found for the defendants, at the last term in this county, and the plaintiff moved to file his exceptions to the verdict, but it did not appear that any exceptions had been filed or allowed agreeably to the statute of 1803, c. 93. § 5. The plaintiff now moved that he might file his exceptions and that the judge before whom the cause was tried might allow them.

Exceptions to a verdict under the statute of 1803, c. 93. must be filed and allowed at the same term in which the verdict is rendered.

But the court observed that by the express provisions of the statute, exceptions which were given by the statute against verdicts must be allowed at the term in which the verdicts were found: and that the motion could not prevail, unless the defendants would consent. The defendants refusing to consent, the court said that the only remedy open for the plaintiff was by petition for a new trial, on which he might be relieved upon shewing that the verdict ought to have been set aside.

Judgment according to verdict.

DAVID WILCOX *versus* JOSIAH MILLS.

The defendant's plea in abatement having been overruled [*vide ante page* 218.] he now came into court, and submitted to be examined on interrogatories agreeably to the statute of 1794, c. 65. § 6. On his examination he was discharged and moved for costs against the plaintiff.

Of costs for a trustee in a foreign attachment.

The court were of opinion that within the equitable construction of the statute he was not entitled to costs for appearing and pleading an insufficient plea in abatement: but that he was entitled to his costs for coming in this term and submitting to an examination, on which he has been discharged; and his costs were directed to be taxed for this term only.

ANDREW WHITNEY *versus* CHARLES WHITMAN.

One *non compos mentis* defends in an action by his guardian, and dies pending the suit; the guardian can no longer appear in the defence, but the executor or administrator of the *non compos*, if the cause of action survives against him, must defend.

WHEN this action was commenced, the defendant was a person *non compos mentis*, and he defended by *Charles Whitman, jnn.* who had been duly appointed his guardian. The plaintiff obtained a verdict in the court below, and from the judgment on that verdict the defendant by his guardian appealed. Pending the appeal the original defendant died, and administration of his estate was committed to *Charles Whitman*, who had been the guardian; and who now comes into court and moves that he may defend the suit in his capacity of administrator of the estate of the original defendant.

The court observed that by the death of the ward the authority of the guardian to defend was extinguished, that the action was not against the guardian but against the ward, and that on his death it might, as in other cases of personal actions, where the cause of action survived, be defended by the executor or administrator. The motion was granted.

ELIJAH DIX AND AL.

versus

SAMUEL COBB AND JONAS WHITNEY, HIS TRUSTEE.

A book debt for goods sold is assignable in equity.

If an attaching creditor, having knowledge of an assignment of the debt which he attaches, believes it fraudulent, he may sue the assignee as trustee and compel a discovery.

THE question in this case arose on the trustee's answer to the interrogatory put by the plaintiff. In that answer *Whitney* acknowledges that at the time of the service of the writ upon him, *Cobb* had a book account against him for sundry articles of merchandize to the amount of about fifteen dollars, for which he, *Whitney*, had not paid. After the service of the writ, a paper or assignment under the hand and seal of *Cobb*, a copy of which is annexed to, and made part of the answer, was presented to him by the attorney of the assignees named in the said instrument, by whom he was also requested to pay to the said assignees the sum he owed to *Cobb*

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was notified that the assignment was given for the consideration therein expressed, that *Cobb* had no claim on him for the said debt, and was forbidden to pay it to him.

The said assignment was a deed poll, in which *Cobb* acknowledging that he owed unto *S. & H. Higginson* sundry sums of money on several notes of hand which he recites, and unto *A. Elliot* sundry other sums on other notes which he also recites, and declaring himself willing to secure the said *Higginsons* and *Elliot*, as far as he was able, the said several sums, assigns and makes over unto them all sums of money due him from a number of persons, whom he names, and among whom is *Jonas Whitney*, the trustee in this case, for the express purpose of securing the payment of the notes above described, and the money arising from the debts so assigned, after payment of two particular sums, are to be endorsed on the notes of *Cobb* to the said assignees, and, the surplus paid over to *Cobb*. And there is likewise power given the assignees, to demand and sue for the several sums so assigned.

The question was argued at this term by *Strong* of *Westminster* for the plaintiffs, and *A. Bigelow* for the trustee.

Strong contended that the assignee was not protected in his assignment until he had given notice to the debtor, and the attachment in this case being previous to the notice would hold the trustee(1).

Though it cannot now be contended that the assignment of a *chose in action* will not be supported, yet a demand of the kind disclosed here seems in its nature less capable of transfer than a bond or note not negotiable, which may be called portable demands. An account of goods sold is a mere memorandum, and is of itself no more evidence of a debt than a like entry or memorandum of a trespass would be evidence of such trespass.

But if such a demand is assignable, there should be evidence not merely of the assignment, but of a valuable and adequate consideration, and notice of the assignment given to the debtor. In the case before the court, suppose the assignment and consideration proved, yet there was no no-

(1) *Comstock* vs. *Farnham & trustee*, 2 *Mass. R.* 96.

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tice to the debtor until after the law had interposed, and had given to the present plaintiffs a lien on the debt. If any transaction taking place after the service of the process on the supposed trustee can alter the relations of the parties, very great confusion will follow. If at the time of the service it was in *Cobb's* power to discharge *Whitney*, which will not be denied, then it is inevitable that he was at that time the debtor and trustee of *Cobb*.

Further here is no evidence, nor, since the whole must come from the trustee, can there be evidence that any consideration was ever given for this assignment. It is competent for the plaintiffs to deny that any thing was due from *Cobb* to these assignees.

Bigelow. The assignment in this case of itself proves the consideration paid. Notice answers every purpose if given before the money is actually paid by the trustee, or a judgment in force against him. In this case it can make no difference in the rights of these plaintiffs at what time the trustee had notice, or whether he had any notice at all. If we cannot go out of the trustee's answer to prove a valuable and sufficient consideration paid, yet fraud is not to be presumed.

The action stood continued *nisi* for advisement, and the opinion of the court was delivered at the succeeding March term in *Suffolk* by

PARSONS, C. J. Has *Whitney* by his answer to the plaintiffs' interrogatory discharged himself? is the question submitted to the court.

This answer admits that he formerly owed *Cobb* about fifteen dollars on account for merchandize purchased: that when he was sued he had no knwledge that *Cobb* had assigned this debt, but that he has since been informed by the attorney of *Higginson* and others that before the suit this debt had been assigned to them, and was forbidden to pay it to *Cobb*, but was requested to pay it to the assignees. A copy of the assignment, under the seal of *Cobb*, the trustee annexes, and makes it a part of his answer.

The plaintiff insists that this debt is not protected from his attachment by the assignment for several reasons.—One is the nature of the debt, resting for its evidence on an account-

book and not on a note or bond, is such that it is incapable of assignment.—Another reason is, that he made the attachment before the trustee had notice, and also that the trustee, not being privy to the assignment, it may without his knowledge be fraudulent as to the creditors of the assignor.

After full consideration we are satisfied that *Whitney* has discharged himself by his answer. The debt is a *chose in action*, and like other *choses in action*, except negotiable securities, is not assignable at law; but all *choses in action* may be assigned in equity, and the assignee has an equitable right, which he may enforce at law in the name of the assignor, whose release or bankruptcy shall not defeat it.

In the case of *Winch* vs. *Keeley* [1 *Term R.* 619.] the debtor had assigned, as in this case, a debt due for goods sold, and he afterwards becoming bankrupt, it was determined that the assignment should protect the debt against the assignees under the commission of bankruptcy. If the debtor has paid the debt to the assignor without notice of the assignment, he shall be discharged; for he shall not suffer by the neglect of the assignee.

The doctrine which establishes the assignability in equity of *choses in action*, arises from the public utility of increasing the quantity of transferable property, in aid of commerce and of private credit.

The assignment in this case *may* be fraudulent, but on its face it appears to be regular, and for a valuable consideration; and we cannot presume fraud.

When an attaching creditor has reason to believe the assignment fraudulent, of which he has knowledge before the suit, he may sue the assignee as a trustee, and compel him to a discovery on oath.—Or if he has not notice seasonably to sue the assignee as a trustee, he may, after he has recovered judgment against the principal, sue an action of debt on that judgment, and summon the assignee as a trustee in that action, and compel him to a discovery on oath upon the penalty of paying the debt, and if on this discovery the assignment should be fraudulent, the assignee would be adjudged a trustee so far as he had derived any benefit from it. And

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it is much better to leave the attaching creditor to this remedy, than to presume an assignment fraudulent, or to defeat the assignability of *choses in action*.

Although the trustee in this case had no notice of the assignment, until after he was sued as a trustee, yet immediately on the assignment, the equitable interest in the debt, as between the parties to it, immediately passed to the assignee. And if the assignor had afterwards received the debt, he would be obliged to pay it over to the assignee. But an attaching creditor cannot stand on a better footing than his debtor (if the assignment be not fraudulent as to creditors), and if he attaches any property of his debtor, it must be attached subject to all lawfully existing liens created by his debtor. And consequently if his debtor have no equitable interest in a *chose in action*, the creditor cannot acquire any by his attachment.

Therefore the want of notice in the trustee will not defeat the assignee's interest in this debt in favour of an attaching creditor. This point was decided in *Suffolk* about eight years ago in the case of *Wakefield* vs. *Martin and trustees*.

Judgment that Whitney *be discharged as trustee.*

(2) *Ante Vol.* 3. 558.

ELISHA BIGELOW

versus

THANKFUL JONES ADMINISTRATRIX OF FAREWELL JONES.

The lands of a deceased testator being liable to be levied on to satisfy the debts which he owed, the conveyance of those lands by the devisee does not defeat the lien of the creditor, but they may be taken from the purchaser; and the delivery of seizin by the sheriff is an eviction of the tenant; whose damages are to be measured by the value of the land at the time of the eviction, with the addition of interest.

THIS was an action of *covenant broken* founded on a deed of conveyance made by the defendant's intestate to the plaintiff bearing date March 24th, 1802. The parties submitted the cause to the opinion of the court without argument on a statement of facts, whereby it was agreed that the said intestate made the deed declared on, by which he conveyed the land therein described to the plaintiff in fee simple, with covenants that he was seized in fee of the premises, that they were free of all incumbrances, and that he would warrant

and defend the same to the plaintiff, and his heirs and assigns forever, against the lawful claims and demands of all persons.

The land formerly belonged to *Moses Gill*, Esq. who devised it to his nephew *Moses Gill* in fee simple, who conveyed it to the defendant's intestate in fee. The same land was afterwards levied upon by *Ward N. Boylston* under the judgment recited in the case of *Wyman* vs. *Brigden*, *ante*. 150. And the plaintiff knowing that the said land was parcel of the estate of the said *M. G.* deceased, and believing that it was liable for the payment of his debts, did not resist the said levy, and the said *W. N. B.* has ever since had possession thereof.

Upon these facts it was agreed by the parties that if the court should be of opinion that the plaintiff has a right to maintain this action the defendant should confess judgment for such damages as the court should think the plaintiff had sustained, with costs. But if the court should be of a different opinion, the plaintiff should become nonsuit, and the defendant recover her costs.

PARSONS, C. J. The several questions arising on these facts have been already decided by the court in the cases of *Gore* vs. *Brazier* [*ante Vol.* 3. 523.] and *Wyman* vs. *Brigden* [*ante* 150.] and the plaintiff must have judgment, unless we should overturn those decisions, which were made on covenants of warranty in the conveyances of lands executed by the same devisee, under the same will of the late Lieut. Governor *Gill*, and which had been broken by the eviction of the grantees, to satisfy the demands of the same judgment creditor.

We have decided that the lands of the testator are liable to be levied on to satisfy the debts which he owed: that the conveyance of these lands by the devisee did not defeat the lien of the creditor, to whom no laches were imputable: that these lands might be levied on and taken from the purchaser: and that the delivery of seizin by the sheriff to the creditor in satisfaction of his execution is an eviction of the tenant. These decisions necessarily resulted from the obvious construction of the statutes making lands and tenements liable for the payment of debts.

Bigelow *vs.* Jones, admx.

The damages in this case must be measured by the value of the land at the time of the eviction; to which interest may be added until the time when the damages are assessed.

Let judgment be entered for the plaintiff.

A. Bigelow for the plaintiff.

T. Bigelow for the defendant.

JOHN WELLS & AL.

versus

LIBERTY BANISTER & AL. AND SETH BANISTER AS THEIR TRUSTEE.

Where a son had built a house on the land of his father, under an expectation that the father would devise the land to the son, the father is not answerable to the son, or to his creditors upon a foreign attachment, for the value of the house.

A plaintiff is entitled to costs against the defendant after a default until the final decision, whether one sued as trustee of the defendant shall be held as such or not.

THE supposed trustee on his examination in the court below disclosed the following facts, *viz.*

"About thirty nine years ago, *Seth Banister*, my father, conveyed to me a tract of land in *Brookfield*, which I have ever since owned. About five years since the said *Liberty Banister*, who is my son, requested my license to erect a dwelling house and other accommodations on said land. I consented thereto, and at the same time told him that at my decease, if I should leave any property to my children, I might probably bestow that part of my real estate upon him; but I made no contract or agreement, directly or indirectly, with my said son to convey said land to him, or to pay him for erecting said house and accommodations thereon: nor did I ever expect or contemplate so to do: nor did I ever desire my said son to build said house and accommodations: nor have I any objections that whoever has a right thereto should remove the same, provided said land be left in as good a situation as it was before the said *Liberty* did any thing thereto. ———I do not absolutely know at whose expense the said buildings were erected, but suppose it to have been at the expense of my said son. They were erected before the service of the writ in this action upon me, and now remain on said land. I have never paid any body for said buildings, nor did I ever engage or expect so to do."——

Wells & al. vs. Banistee & al. & truster.

Upham, for the plaintiff, suggested that the consent of the supposed trustee to have the house built on his land was sufficient to charge him on an implied promise: and if the son had a right of action against him for the materials and labour expended, he must of course be held as trustee.

By the court. The facts disclosed by the person summoned as trustee in this case do not furnish a pretence for charging him. He is the owner of a tract of land, on which he had permitted the principal, his son, to build a dwelling house for the son's convenience and accommodation, under an expectation that the land on which the house was built, would by devise come to the son at the death of the father. There was no contract, express or implied, that the father should own the house, or in any event be accountable to the son for the value of it. By the strict operation of the law it is true that the father, having the property of the land, might disturb the son in the possession of the house, and indeed remove him from it. But it is not to be presumed that he would have taken this advantage of his son; and he ought not to be made the owner of the house against his consent, by compelling him to pay the expense of building it.

The property of the house is personal property of the son, he having no estate in the land: and the most that can be made of the consent of the father to build upon his land, is a right to occupy the land without rent; and perhaps a right in the son, or persons claiming under him by purchase or execution, to enter and remove the buildings, without being subject to any other than nominal damages in an action of trespass.

The supposed trustee must be discharged.

The principal debtors having suffered a default in the common pleas, *Merrick*, who had been of counsel for them, moved the court for a direction to the clerk not to tax any costs for the plaintiffs posterior to the default.

By the court. The plaintiffs are entitled to their costs to the time of final judgment. The appeal of either the parties sets the cause afloat. It was necessary to the plaintiffs to attend to the action until its final decision; and it is reasonable that they should be allowed their costs so long as they were obliged to attend.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF NORFOLK,

OCTOBER TERM, 808,

AT DEDHAM.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, } JUSTICES.
HON. ISAAC PARKER, }

AARON PUTNAM, PLAINTIFF IN ERROR,
versus
ASAPH CHURCHILL.

An agreement of a defendant in a suit pending in the court of common pleas, that he will not appeal from a judgment rendered against him by that court in such suit, does not preclude him from bringing his writ of error on such judgment.

THE defendant in error, as endorsee of a negotiable promissory note brought his action upon it against *Putnam*, the maker of the note. At the court of common pleas, *Putnam*, to obtain a continuance, had made an agreement on record, that he would not appeal from the judgment of that court, if it should be rendered against him. He then pleaded usury and offered to verify his plea by his oath agreeably to the statute of 1783, c. 55. To this plea *Churchill* demurred, and in the common pleas recovered judgment.

To reverse that judgment, *Putnam* has sued his writ of error, and has assigned the general error. *Churchill* now moved the court that the writ of error might be quashed, as not lying in this case, because *Putnam* might have appealed from the judgment, which appeal he voluntarily waived.

In an action by the endorsee of a promissory note against the promiser, the defendant cannot tender his oath in vercification of a plea of usury under the statute of 1783, c. 55.

By the court. It is generally true that, where an appeal is given by statute from the judgment of any court, the remedy, if a party be aggrieved by the judgment, should be by appeal on which the merits of the cause may be examined, as well as errors in law or fact corrected. But this rule does not extend to cases where the party had no oportunity to appeal, without any fault or neglect on his part. When *Putnam* had waived his right to appeal by an agreement on record, to which *Churchill* himself was a party, he ought not to be considered as in fault. He has lost his right to appeal, and consequently a remedy, by which he might obtain relief upon the merits, if he was aggrieved. But his agreement does not extend to a release of errors, which may be pleaded to a writ of error, or to the waiving of his remedy by that writ. *Churchill* is entitled to the full benefit of his agreement. He has not had his judgment suspended by appeal, and all questions on the merits are at rest. But if there are errors in law or fact sufficient to annul his judgment, we must hear them. The writ of error is not quashed.

The defendant in error then pleaded *in nullo est erratum.*

By the court. The question upon the record is whether *Putnam's* plea was or was not good. He has endeavoured to support his plea on the statute of usury. On examining that statute we are of opinion that his plea is not within it. By the statute, if the debtor sued will come into court (the creditor being alive) and will swear that the contract sued is usurious, he shall have judgment, unless the creditor will swear that the contract is not usurious. The statute therefore supposes the creditor to be conusant of the fact, whether the contract was or was not usurious. But the endorsee of a negotiable security is not one of the original contracting parties, and may not have any knowledge of the consideration, on which the security was given. The statute therefore contemplates cases only, where the original contracting parties are also the parties to the suit.

This point is not new, and it has been repeatedly decided against the defendant. His remedy was by pleading usury to the country, and submitting his evidence to a jury. Indeed it is to be wished that in all cases this trial by the oath

Putnam *vs.* Churchill, *in error.*

of the parties might be abolished, as it creates a temptation to commit the horrible crime of perjury.

Let the judgment be affirmed with costs.

Whitman for the plaintiff in error.

Wheaton for the defendant in error.

SAMUEL PLUMB *versus* SETH T. WHITING.

One cannot be sworn as a witness who would testify under an impression that he is interested in the event of the suit, although in fact he has no legal interest in such suit.

THIS was an action of *assumpsit* for four months and twenty-seven days labour of the plaintiff's son. On the general issue pleaded, the cause was tried before *Thatcher, J.* from whose report of the trial it appears that the defendant did not dispute the performance of the service, but insisted that it was done under an express hiring for a year at 72 dollars, and that the son left his service against his will within the year. This contract was denied by the plaintiff. On the trial, the plaintiff, to maintain the issue on his part, produced a witness, who swore that he was present at the making of the contract, and that the parties agreed that the son should work for the defendant a year at 72 dollars, or 6 dollars a month, *if both parties liked*, and that *the son should have one half of the money.* The son was then called by the plaintiff. The defendant objected against his being sworn as interested; but he was admitted and testified to the same facts, to which the preceding witness had sworn.

The defendant produced some witnesses to contradict this testimony: and the judge left it to the jury to settle the nature of the contract between the plaintiff and the defendant; and instructed them that if they were satisfied that the plaintiff at the time of the agreement understood that his son might leave the service of the defendant before the expiration of the year, and demand a compensation *pro ratâ*, they ought to find for the plaintiff and assess his damages accordingly: but if they believed that the parties understood the contract otherwise, then they ought to find a verdict that the defendant never promised.

The jury found a verdict for the plaintiff, and the defendant moved for a new trial, because the son, as being interested in the event of the suit, was improperly admitted as a witness.

This motion was briefly spoken to by *T. Williams* in support of it, and *Hastings* on the other side. The action was continued *nisi* for advisement, and at the March term succeeding in *Suffolk*, the opinion of the court was delivered by

PARSONS, C. J. If the plaintiff's son was immediately and directly interested in the event of the suit, it is very clear that he ought to have been rejected; and if he was to have one moiety of his earnings, he was directly interested in the event of the suit to recover them. Now the witness produced by the plaintiff, swore that by the bargain the plaintiff had agreed that the son should have half his wages, and this testimony was not contradicted; nor can the credit of this witness be impeached by the plaintiff who produced him. The plaintiff has himself proved the interest of his son, whom he offers as a witness: and the son being thus proved to be interested, ought not to have been admitted as a witness for the plaintiff.

For the plaintiff, it has been argued, that the engagement of the father to let his minor son have half his wages, is a voluntary promise resulting from the father's bounty, and cannot be enforced at law; and that an interest resulting from a voluntary promise not obligatory in law will not disqualify a witness.

If a witness would testify under the impression of an interest, which he honestly believes that he has in the event of the suit, he cannot be sworn: for the effect on his mind must be the same, whether his interest arises from a legal contract, or from a gratuitous promise, on which he confidently relies. And in this case it does not lie with the plaintiff to say that the witness he produced does not confide in the promise, which the plaintiff himself has made to him.

The verdict must be set aside and a new trial granted.

JAMES DICKENSON, PETITIONER FOR A REVIEW.

versus

PETER DAVIS.

A writ of review does not lie upon a judgment of the court of common pleas rendered upon the report of referees appointed pursuant to the statute of 1786, c. 21.

THE parties had entered into a rule of reference before a justice of the peace, pursuant to the statute of 1786, c. 21. The referees had heard the parties, and had reported to the last court of common pleas in *Middlesex*, where the report had been accepted, and judgment for *Davis* entered upon it. The petitioner stated in his petition, that before he had entered into the rule, he had been attached as the trustee of *Davis'*, and prayed that he might not be twice charged for the same demand, *viz.* on *Davis'* judgment, and again as his trustee.

The court refused to grant the petition, because they had no authority in this case. When a review is grantable, the cause must be *triable* on a review: it must therefore be commenced by writ, containing a declaration, to which a plea may be pleaded, and an issue joined and tried. The origin of the judgment complained of in this case was not by writ, but by a general rule of reference before a justice, containing no demand alleged with sufficient certainty to admit of a plea and of a trial at law upon an issue that could be regularly joined.

L. Richardson for the petitioner.

T. Williams for the respondent.

JOSHUA CLAP, PLAINTIFF IN ERROR

versus

ELIPHAZ CLAP.

If the record of a judgment of a justice of the peace refer to the writ on file, the court, on error brought to reverse such judgment, will consider the declaration in such writ as a part of the judgment.

THE points in this case will sufficiently appear from the opinion of the court as delivered by

PARSONS. C. J. This writ was directed to *Seth Bullard*, Esq. commanding him to send the record and proceedings in a certain cause between these parties, in which the said

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Bullard, as a justice of the peace, had rendered judgment for the defendant in error, who was the original plaintiff, against the plaintiff in error, who was the original defendant. The record being sent up, *in nullo est erratum* has been pleaded to the assignment of the general error.

On inspecting the record of the judgment, it appears to have been rendered in June, 1789, for 15*l.* 4*s.* 11*d.* damages and costs, the justice having jurisdiction by virtue of the statute of 1788, c. 67. then in force and known by the name of the *confession act*.

The justice after shewing in his record the time and place when and where his court was holden, proceeds in these words, "*Eliphaz Clap*, of *W.* &c. plaintiff, against *Joshua* "*Clap*, of the said *W.* &c. defendant, in a plea of the case "for not paying him eleven pounds, thirteen shillings and "two pence, with interest, according to his note dated May "1, 1784." The record then alleges the appearance of the plaintiff, and the default of the defendant, upon which the judgment is entered. The justice has also sent up the copy of a writ, purporting to be sued by *Eliphaz Clap*, against *Joshua Clap*, containing a declaration sufficiently formal.

The record of the judgment is extremely defective: no promise is alleged, nor any time, place, or consideration for making any promise.

Knowing the general defects of the proceedings before justices under that statute, we have endeavoured to find some ground, on which we could support the judgment. If the judgment had referred to the writ on file with the justice for a declaration, according to a very irregular practice. which formerly prevailed in the common pleas, we should have been disposed to consider the writ as a part of the judgment, so far as it contained the declaration, and thus have saved the judgment. But in the record there is no reference to any writ.

Presuming from the copy of a writ sent us that the justice had sufficient materials, from which to amend his record, we last year ordered the cause to stand over, that the defendant in error might find a more correct judgment: but it is said that the justice was found too aged and infirm to at-

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tend to his files. We must therefore take the record as it was originally sent, and for the manifest errors in it the judgment must be reversed.

B. Whitman for the plaintiff in error.

Wheaton for the defendant in error.

THE INHABITANTS OF THE TOWNS OF STOUGHTON, SHARON AND CANTON.

versus

EDMUND BAKER AND DANIEL VOSE.

If the legislature appoint a committee to cause alterations to be made in the fishways in a river, and order a portion of the expense of such alterations to be borne by the owners of the dams where the alterations shall be made, such owners are not held to pay a portion of the expense of such committee.

THIS was a special action of the case in which the plaintiffs declare that on the 15th day of March, 1805, the legislature of this commonwealth appointed *N. Tillinghast*, *E. Loud* and *E. Turner*, Esquires, a committee, after giving due notice to the parties, to repair to the several dams on *Neponset* river, between the sea and *Paul's* bridge on said river, and to order such alterations to be made in the fishways through the several dams aforesaid, or to cause such new fishways to be made around said dams or either of them, as in their opinion or the major part of them, should be sufficient for the passage of shad and alewives at the dams aforesaid. The expenses incurred by making such alterations, it was resolved, should be borne one fourth part by the towns of *Stoughton*, *Sharon* and *Canton*, and three

A grant of a dam and wear upon a river, with the exclusive right to take fish in the river below the dam, does not preclude the public from a right to have a convenient passage way for the fish to ascend the river to the ponds.

Every owner of a mill-dam holds it under the limitation that a sufficient and reasonable passage way shall be allowed for the fish; and this limitation is not extinguished by any neglect of the government in compelling the owner to comply with it.

The government may compel such compliance by their committee: but if a prostration of the dam, not within such limitation, be made by such committee, the owner may have a remedy by an action at law.

Such committee may cause the alterations to be made under their direction; but they are not personally answerable to those whom they employ: and as the exercise of their authority is personal, it cannot be delegated to any other person, or to even one of their own number.

fourth parts by the respective owners of the dams where the alterations should be made. And the plaintiffs aver that in pursuance of said resolve the said *Tillinghast*, *Loud* and *Turner*, on the 30th day of May, in the same year, did repair to the dam on the said *Neponset* river, between the sea and *Paul's* bridge, owned by the defendants, and ordered certain alterations to be made in the fishways through the same, sufficient for the passing of shad and alewives : in pursuance of which order the said alterations were made ; in and about the doings of which the plaintiffs incurred and paid expenses to the amount of 274 dollars 53 cents, three fourth parts of which is 205 dollars 90 cents ; of all which the defendants had notice, and thereby and by force of the resolve aforesaid became liable, &c. and promised, &c. There was also a count for money laid out and expended.

Upon the general issue pleaded a verdict was taken for the whole sum demanded by the plaintiffs, subject to the opinion of the court on a case stated by the parties, in which it is agreed that the resolution declared on passed the legislature : that the defendants are seized in fee simple of a water mill and dam on *Neponset* river, between the sea and *Paul's* bridge : that the said committee having heard all the parties, ordered certain alterations to be made in the fishway through the dam of the defendants, who were notified of the said order and requested by the plaintiffs to make the said alterations, which they refused to do until the then next spring : that afterwards in the same year, the plaintiffs applied to the said *Loud*, who had been appointed a sub-committee, to see that the alterations ordered as aforesaid were complied with, and the said *Loud* upon being informed of the said refusal of the defendants, ordered the plaintiffs to make the said alterations in a prudent faithful manner ; that the plaintiffs afterward caused the said alterations to be made, and expended therein for work and materials the sum of 123 dollars 82 cents, and the further sum of 150 dollars 71 cents, in paying the said committee and sub-committee for their time and expenses in performing the services aforesaid, and in paying the persons who attended on them in behalf of the plaintiffs when performing the said services :

Stoughton & al. vs. Baker & al.

that notice of the expenditures was given to the defendants and payment demanded of them.

The case further states that the defendants' dam is an ancient dam, and their title thereto is derived from one *Israel Stoughton*, who acquired his right thereto in the year 1633, by grants to him from the town of *Dorchester*, in which the land then was, of a mill privilege, of a wear adjoining his mill, and an exclusive right to take shad and alewives between the wear and the bridge, with a condition that he was to sell the alewives there taken to the plantation at five shillings the thousand, and other fish at reasonable rates; and he was not to transfer the mill to any one without the consent of the plantation first had and obtained: that the said grants were confirmed by the general court in the year 1634: that no fishway was ever made through the said dam until the year 1789, when the fishway was made (the alteration of which was directed as aforesaid) pursuant to a resolution of the general court, passed February 17th, 1789, at the expense of the said towns of *Stoughton* and *Sharon*, on whose petition that resolution passed.

If on these facts it should be the opinion of the court that the plaintiffs were by law entitled to recover three fourth parts of the sums aforesaid, judgment to be entered according to the verdict: If their opinion should be that the plaintiffs are entitled to recover only the amount expended by them in labour and materials, then the verdict is to be amended by reducing the sum there found to 92 dollars 87 cents: But if their opinion should be that the plaintiffs are entitled to recover any thing of the defendants, the verdict to be set aside, and a general verdict entered for the defendants. And now

Jackson, for the defendants, moved that the verdict be set aside, and he argued that the plaintiffs, being the successors of the ancient town of *Dorchester*, under whose grant the defendants derive their title, were estopped from disturbing the defendants in the enjoyment of the grant of their predecessor.

The defendants having, by grant of the town, confirmed by the government of the colony in its earliest period, been so long possessed of this estate, the legislature had no right in

1805, to interfere and take from them their estate. The government was deceived, and the resolve was void as militating with the declaration of rights. The privilege of erecting a mill dam is as strictly an estate as land itself, and in many situations it is of very great value.

But if the government had a right to interfere and to make regulations as to the defendants' mode and degree of enjoying their estate, nothing can be more absurd or unconstitutional than to oblige them to defray the expense of the measure by which their estate is deteriorated.

The expenses of the committee are not only liable to the same objection, but further these are not within the words of the resolution, *viz.* "the expenses incurred *by making such alterations.*"

Wheaton, for the plaintiffs, observed that this action was brought solely to recover the expenses arising under a resolution of the legislature intended to regulate the passage of fish in *Neponset* river. If the legislature had authority to pass that resolution, there con be no doubt of the plaintiffs' right to recover what has been properly expended under the provisions of the resolution, and assessed on the defendants by the same provisions.

The uniform and uninterrupted practice of the legislatures, as well before as since the revolution, to regulate the taking of fish in all the rivers and streams within the territory, is very strong evidence of the general opinion that they had a right so to do. Besides which there has been an adjudication of this court(1) in the case of this individual dam, in which it was decided that the legislature had authority to provide for the passage of the fish through it.

The resolution in this case amounts to no more than the exercise in a particular instance of the superintending care of the government in relation to the fisheries. The plaintiffs claim no exclusive right to the fish in this river. They merely applied to the legislature to regulate the exercise and enjoyment of a general right. The legislature did so, and when these defendants refused to do what by law they were bound to, the plaintiffs did it for them, and now demand an indemnity.

(1) *Lewis qui tam* vs. *Leeds & al. Suffolk, Aug. T.* 1794.

Stoughton & al. *vs.* Baker & al.

As to the expenses of the committee, *Wheaton* had not been very sanguine, but as it was a necessary means towards obtaining the end, it should seem that it might be included in the *expenses incurred* by making the alteration.

Jackson, in reply, insisted that no authority was vested in the commonwealth to take the property of an individual without compensation: much less could the individuals, whose property was taken or injured, be held to pay the expense attending the transaction, the expense of transferring a privilege from such persons to others. He pressed this point with more zeal, he said, because the towns, if they found their speculations become expensive, would cease to vex and harrass the defendants and other mill owners with them. He used the term speculations, he said, because there had not been a fish of the species which these proceedings were intended to protect for more than half a century, except such as had been carried in tubs, &c.

The action stood continued *nisi*, and at the March term in *Suffolk* the opinion of the court was delivered by

PARSONS, C. J. The plaintiffs found their claim on the resolution of the legislature recited in the declaration: on the alteration of the former sluice way ordered by the committee therein appointed: on the refusal of the defendants to make that alteration seasonably: on the authority given by Mr. *Loud* as a sub-committee to the plaintiffs to make that alteration: and on the plaintiffs' making it pursuant to that authority.

The defendants object to the claim of reimbursement of the money paid to defray the expenses of the committee; and we are satisfied this objection is well founded. The resolve is silent on this subject, and the only charge which it imposes on the owners of the dam is three fourths of the expenses incurred in altering the sluice way.

The defendants also object to the claim for the expenses of making the alterations in the sluice way, arguing that the legislature had no authority to pass the said ressolve. Because their dam is an ancient dam derived from a grant by the town of *Dorchester* in 1633, held by them and by those whose estate they have therein, without any sluice way for

the passage of fish from that time to the year 1789, when the legislature first directed that a passage should be opened for fish:—Because in the year 1633, a wear for the taking of fish was granted as appurtenant to their mill, by which the grantee, his heirs and assigns had a several fishery between the dam and the sea, and that this grant of a wear was in the same year confirmed by the colony legislature, so that the public have no right for the passage of fish above or through their wear:—Because if the public have this right, it should be exercised by the intervention of a jury to describe the site and dimensions of the sluice way, and not by a committee of the general court, who may through error or mistake order the whole dam to be prostrated, and thereby destroy or render useless the estate the defendants have in the mill: Because if the public have not this right, but claim to take it for the public use, the commonwealth is bound by the constitution to make a reasonable compensation to the owners, and not charge them with the expense of making the sluice way.

The grants on which the defendants rely are made part of the case. The grant by *Dorchester* relating to the dam is in these words, "It is generally agreed that Mr. *Israel Stough-* "*ton* shall build a water mill if he see cause." Then follows a grant to him of a wear adjoining to his mill; and no person is to cross the river with a net or otherwise to the prejudice of the said wear: but *Stoughton* is to sell the alewives at five shillings per thousand, and the other fish at reasonable rates. The colony legislature in 1634, confirmed the grant of the wear to *Stoughton* and his heirs, he agreeing to build and maintain a horse-bridge over the river.

The wear thus granted and confirmed amounted to the franchise of a several fishery at that place, but it extended to no other place on the river above it. And this franchise cannot be construed to include a right of excluding all fish from passing above the wear. The value of this fishery depends on the shoals of fish that enter the river to pass to the ponds above to cast their spawn: and if none were allowed to pass, the fishery would be of little value, and the public, to whom *Stoughton* was obliged to sell, would lose their supply, which was one of the considerations of granting the franchise.

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We are therefore satisfied that this franchise, if it were not lost, would be no objection to the right of the public to have a convenient passage way for the fish to ascend the river to the ponds. In examining the grants, this franchise is not appurtenant to the mill; but is a several independent interest granted on conditions. And the case does not state that it was ever exercised by *Stoughton*, or by those who claim under him; and at this time we must presume that it is lost and gone by *nonuser*.

The ancient grants by towns are very loosely expressed, and when a fee was intended, words of inheritance are seldom used. When a long possession by the grantee, his heirs or assigns, has followed, the original grant has uniformly been considered as a grant of a fee. In this case we are therefore of opinion that *Stoughton* took a fee in the *mill-privilege*, as it is usually called in this state. And having a privilege to build a mill, he necessarily had a right to erect a dam, to raise water sufficient to drive his mill.

But the right to build a dam for the use of a mill was under several implied limitations. One was to protect private rights by compelling him to make compensation to the owners of land above for, and damages occasioned by overflowing their lands: another was to protect the rights of the public to the fishery; so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage way shall be allowed for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights.

If the government should, in its grant of a *mill-privilege*, expressly or by necessary implication, waive this limitation, it would be bound. But it would be an unreasonable construction of the grant by *Dorchester*, to admit that by it all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled.

The public therefore having a right to the benefits of this limitation as to the mill and dam of the defendants, there must be some remedy, by which this public benefit may be secured. But this remedy, say the defendants, cannot be obtained by any authority of a committee of the general court; but should be sought for through the intervention of a jury.

The legislature may make all laws not repugnant to the constitution: and we do not know that this law is repugnant to it. And the usage of the general court, to appoint committees to locate and describe the site and dimensions of passage ways for fish, is ancient and has been long continued. But if a committee thus appointed should locate and describe a passage way for fish unnecessary and unreasonable, by which the property of the owner of the mill was injured without any public benefit, we do not admit that he would be without remedy. The owner holds his privilege subject to the limitation, that a reasonable and sufficient passage way should be allowed for the fish. Beyond this the public has no interest, and private right is invaded. Any prostration of the dam by a committee, not within this limitation, would be an injury to the owner, for which he might appeal to his country, and have a remedy by the verdict of a jury.

Another objection made was, that if this resolution was constitutional, the legislature might authorize strangers to enter without right on the freehold or lawful possession of another.

This objection supposing that strangers enter without right s begging the question. For if the owner of the dam hold it under the limitation mentioned, that limitation must extend to give a right to the government to enter and remove obstructions, which if not removed would defeat the limitation.

In this action it does not appear that at the trial the defendants made any objection to the necessity or reasonableness of the alteration of the sluice way ordered by the committee: on this ground therefore he has now no right to complain.

It has been further argued that if the resolve is constitutional, yet the plaintiff's cannot maintain this action, for several reasons. The resolve authorizes the committee to order altera-

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tions in old passage ways, or to direct new passage ways to be made. Whoever, therefore, say the defendants, make these alterations are agents of the committee, and the committee, who are answerable to their agents, must bring the action.

If this objection were to prevail, no committee would ever undertake the trust. And as their powers are to locate and describe the requisite alterations, but not to make them; if this objection should not prepail, it is argued that after the committee have made the order and given notice to the owner of the dam, they have executed all their powers: and it is the duty of the owner of the dam to make the alterations; and if he disobey the order, he may be punished by indictment. There might be some weight in this objection, if the authority of the committee were confined to the issue of orders; but they are expressly authorized to cause new fishways to be opened. The work may therefore be done under their direction, if the owner refuses to remove the obstruction, which he has placed or continued.

But it is denied that the committee could authorize three towns jointly to make this alteration, so as to give them a joint action.

We think there is some weight in this objection, as it is not easy to conceive how a joint authority could lawfully be vested in three distinct independent corporations, who can act only by a major vote in distinct corporate meetings, by the committee under this general authority given them. But we do not think it necessary to decide on this point, because we are satisfied that the remaining objection is fatal against the action.

This objection is, that it was not competent for Mr. *Loud*, as a sub-committee, to execute any of the powers of the committee, an therefore he could not authorize the plaintiffs or any other persons to make the alteration, so far as to give them a right of action to recover a compensation.

The authority given to the committee is by the terms of the resolve to be exercised by them, or the major part of them. The exercise of this authority is personal, and cannot be delegated. If it could be delegated, it might be delegated to any other man, as well as to Mr. *Loud*, one of the committee. If the committee or a mojor part of them had exercised the pow-

ers given them, it might have been thought by them reasonable to give the defendants time until the next spring to make the alterations; or they might have employed other persons than the plaintiffs to make them. However this might have been, it is extremely clear that the powers given to the committee must be exercised by all, or by the greater part, and that they could not be delegated to Mr. *Loud*, or to any other person.

For this reason the verdict must be set aside, and a general verdict be entered for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF BRISTOL,

OCTOBER TERM, 1808,

AT TAUNTON.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, HON. ISAAC PARKER, } JUSTICES.

JOHN F. MONOSIET, PLAINTIFF IN ERROR,

versus

HENRY POST, JUN. AND ANOTHER.

A submission under statute of 1786, c. 21. must be to *three* referees.

ERROR to reverse a judgment of the court of common pleas for this county, rendered upon the report of referees appointed by a rule entered into before a justice of the peace, pursuant to the provisions of the statute of 1786, c. 21.

The error relied on was, that the submission was made to two referees only, "with such person as they may agree to associate with them in said determination, in case the above-named referees cannot agree," &c.

Per curiam. This error is fatal. The statute must be strictly pursued. When parties leave the common law for these peculiar remedies, they cannot expect the court to shew them particular favour.

Judgment reversed.

Wheaton for plaintiff in error.

Tillinghast for defendant in error.

DESIRE LEONARD, APPELLANT,

versus

GEORGE LEONARD AND OTHERS.

In the assignment of dower, commissioners are only to regard the rents and profits.

THIS was an appeal from a decree of the judge of probate for this county, refusing to accept the return of certain commissioners appointed by him to assign and set off to the appellant her dower in the estate of her late husband, *Samuel Leonard*, Esquire, the respondents being the heirs at law of the said deceased.

Upon inspection of the return, it appeared that the commissioners had appraised the whole of the deceased's real estate at 61,440 dollars, a considerable part of which was woodland and unproductive, and had then assigned to the appellant certain parcels of the estate amounting by the appraisement of the commissioners to the sum of 20,480 dollars, being one third of the whole, excluding therefrom the greater part of the woodland.

It was agreed that the parcels assigned as dower to the appellant comprized the most productive parts of the deceased's estate, and that the commissioners had regarded the actual value of the several parcels in their assignment, and not the income thereof.

By the court. In the assignment of dower, commissioners are to regard the rents and profits only of the several parcels of the estate, out of which the dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part as will yield her one third part of such income, in parcels best calculated for the convenience of herself and of the heirs. This rule is adapted equally to protect widows from having an unproductive part of estates assigned to them, and to guard heirs from being left, during the life of the widow, without the means of support.

The decree of the judge of probate was affirmed, and the cause remitted to him for further proceedings.

Wheaton and *Baylies* for the appellant.

Sproat and *Tillinghast* for the respondents.

EDWARD RICHARDS, JUN.

versus

EBENEZER DAGGET AND OTHERS.

Towns may alter the limits of, or subdivide any existing school district, without being obliged to change the limits of them all.

If after the inhabitants of a school district have voted to raise money for building a school house, and before the same is assessed, the town shall set off certain of the inhabitants, & form them into a separate district, such inhabitants are not liable to be assessed for the money so voted.

TRESPASS against the defendants for taking, carrying away and converting to their own use two stears, the property of the plaintiff, on the 29th, day of March, 1806.

The defendants as to the force and the breach of the peace plead not guilty; and as to the residue of the trespass they justify as assessors of the town of *Attleborough* in this county, of which the parties are all inhabitants, and they allege that the inhabitants of a certain school district, which is described in the plea, on the 12th day of August, 1805, voted to raise the sum of 330 dollars to build a district school house; that the vote was duly certified by the clerk of the district to the defendants, who, on the 15th day of January, 1806, legally assessed the said sum for the purpose of building a school house for the district, and on the same day issued their warrant to a collector to collect the same; that the plaintiff, when the said vote was passed, was an inhabitant of the same district, and was assessed the sum of 20 dollars, 28 cents and 6 mills, being his just proportion, which he refusing to pay, the collector distrained the said stears, which is the residue of the trespass complained of.

The plaintiff replies that after the vote of the district to raise the said sum of money was passed, and before the same was assessed, *viz.* on the 17th day of September, 1805, at a town meeting duly holden, a legal vote was passed that the plaintiff and others named in the said vote should be set off from the said school district, and should be formed into a separate school district.

To this replication the defendants demur, and the plaintiff joins in demurrer.

At the last October term in this county, *Tillinghast* for the defendants, contended that this vote of the district was in nature of a contract among the inhabitants, which the town had no legal or constitutional authority to rescind or annul: but he relied principally on the statute of 1799, c. 66. by the first

section of which the inhabitants of school districts are empowered to raise money for erecting and repairing school houses, and for other purposes connected therewith. By the second section it is provided that every man shall be taxed in the district in which he lives, for all the estate he holds in the town, &c. and the assessors shall assess such monies on the polls and estates of the inhabitants composing any school districts, in thirty days from the vote being certified to them. And by the fourth section it is enacted that any vote passed as aforesaid by a majority of the inhabitants of a school district present at a district meeting legally warned, shall be obligatory on the inhabitants of such district. And *Tillinghast* insisted that by *inhabitants* in these provisions must necessarily be understood those who were inhabitants at the time the monies were voted. And he likened the case to that of persons removing out of a town after the first day of May in any year, who are notwithstanding held by law to pay their proportion of all taxes assessed in the town so left during the same year.

Wheaton, for the plaintiff, argued that as the town had by the statute authority at its discretion to alter the limits of the school districts and to create new ones, and as in this case the town had actually exercised this authority long before this tax was assessed, whereby the plaintiff was bound to contribute his part towards the erection of another school house, it was a very strained and inequitable construction of the statute which would go to compel him to assist in building a school house from which he was, without his own agency or consent, forever debarred any benefit.

When a new town is incorporated out of parts of several old ones, the inhabitants are not liable for the existing debts of the old towns, unless expressly made so by the act of incorporation, which is a case very similar to the one under discussion.

The action stood continued for advisement, and now at this term the opinion of the court was delivered by

PARSONS, C. J. [after stating the substance of the declaration and pleadings.] To the sufficiency of the replication in this case it is objected that the town having once legally determined the limits of the school districts therein, had no

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authority afterwards to alter those limits, or to form a new district within the town.

The power of a town to determine and define the limits of the school districts within it is derivied from the second section of the statute of 1789, c. 19, and no authority is expressly given to any town to make any subsequent alteration of the limits, or to form any new districts out of the former districts.

But it seems reasonable that towns should have this authority. As the original division was an experiment, mistakes might have been made, and inconveniences occasioned, which by a judicious alteration may be removed. In time the population or wealth of a particular part of a town may be much changed, so as to require an union or subdivision of existing districts: and if good policy dictated that each town should have the power of forming itself into school districts, the same policy might require that such alterations should be made by such town, as experience, or a change of circumstances might suggest.

But this question is not to be decided by a probable construction; for by the statute of 1799, c. 66, § 2, this authority in towns is expressly recognized. It is provided in § 2. that a non-resident may be taxed for his estate in any one district the assessors shall appoint: which appointment shall be recorded by the town clerk, and the estate shall be taxed in the same district, until the town shall be "*districted anew.*"

And if the town can form itself into new districts, it must have power to alter the limits of, or subdivide any of the existing districts, without being obliged, no good reason existing therefor, to change the limits of all the districts. We are therefore satisfied that the objection ought not to prevail.

But the principal objection to the replication is, that as the plaintiff does not traverse his living in the particular district when the vote to raise the money was passed, he was legally assessed to the payment of his proportion of that money; although he and others, three months before the assessment, had been formed into, and constituted a new district. And to support this objection it has been observed, that the act makes it the duty of the assessors to assess the tax on the district in thirty days after receiving a certified copy of the vote of the

district to raise it; and the tax cannot be assessed but on the district that voted to raise the money.

The case of alteration in districts, after the passing of votes to raise money, and before the assessment, is not expressly provided for in the statute: which it is our duty so to construe, as will be most convenient, and least injurious to the inhabitants of the town. Because it is always to be presumed that the legislature intend the most beneficial construction of their acts, when the design of them is not apparent.

It is not just that a man should by virtue of this act be assessed to the payment of money, in the raising of which he could have no agency, or from which he could not (without any fault of his own) derive any benefit. Thus if he was included within a district, after the vote to raise the money had passed, it is admitted that he could not be assessed to the payment of it: for not being a member of the district when the money was voted, he could have had no voice in the vote. As he may by the act of his town, against his consent, be excluded from the district, by which the vote was passed, and included in another before the assessment is made, so he can derive no benefit from the payment of the assessment, and it is therefore unreasonable that he should be assessed. If by the alteration of the district a number of persons may be excluded, lessening the numbers, and wealth of the district, it would not be reasonable to assess the whole sum on the remaining members, although they alone will have the benefit of it: for they might have refused to pass the vote to raise so large a sum of money.

Suppose that after a district vote, the district is subdivided into two districts, if the money can then be assessed, for whose use is it to be paid? the superintending committee are to receive it: but there can be no such committee: nor can the two new districts demmand it by the act.

The true and necessary construction of the statute therefore requires that the district voting to raise the money should have the same limits when the money is assessed. For if it has not, it must be considered as a new or different district, and the vote to raise the money as annulled. Upon this con

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struction no injury will be done to any person. If the district, with its new limits, is desirous to raise the whole sum, or a part of it, it may pass a vote for that purpose, and have the money assessed and paid.

But on the other construction great injury might arise. If a district had voted to raise money, a part of it might, by the act of the town, be included in another district. If all who were members when the vote passed must pay the tax to build a school house, a vote for the same purpose may afterwards be passed in the district in which they have been included, their proportion of which they must also pay. And if the town should include them in a third district before the last assessment, they might be obliged to contribute to the building of a third house; and all this in the space of a few months.

But it may be said that the town, by altering the districts after the money is assessed, may produce the same injustice. We admit it, if the collector can proceed to collect his tax. Because we cannot guard against all possible inconveniences by our construction, it is not to be inferred that we are not to guard against any. But in the case that is supposed, if the district has new limits, so that it is not the same district that was assessed, the authority of the collector to collect should cease; the district voting the money, and entitled to receive it from him no longer existing. If a town should occasion unequal burthens among its inhabitants by districting it anew, after taxes have been voted by some of the districts, and have been assessed and paid, this injustice will result from the abuse of the discretionary power vested in the town by the act, and for which no construction we can give the act will provide a remedy.

But it has been argued, that those who were members of a district, when the vote to raise the money was passed, ought to be holden liable to the assessment and payment, notwithstanding before the assessment they were included within new districts; upon the same principle, that every man inhabiting any town on the first day of May, in any year, must pay all the state and town taxes assessed in that town for the year, notwithstanding he may immediately remove from such town.

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This argument would have weight, if there were any analogy between the cases. For no man can be holden to pay for his poll, or for the same estate, any state or town tax but in one town during the year. But in district taxes for building school houses, if the defendants' construction were to prevail, the same man might, for his poll and the same estate be assessed in the same year in different districts in the same town, to raise money for like purposes. There is another distinction. When a man removes from a town, it is a voluntary act of his own. But a man may be included in different school districts even against his will. But the most operative distinction is, that when a new town is incorporated out of one or more towns, the former corporations continue with all their powers and duties. But if a new school district is formed out of one or more districts, all the districts, whose limits are anew prescribed, become in fact new districts.

Upon the best view of the subject we have been able to take of it, we are satisfied that the replication is good, and that the plaintiff must have judgment.

We have not examined the forms of the pleadings, but have given our opinion upon the merits, as the construction of the act is of general consequence. And it is to be wished that towns, in exercising this power, may act with deliberation and wisdom in originally defining the limits of the districts, and may afterwards allow no alterations, but for substantial and important reasons.

Replication adjudged good.

THE INHABITANTS OF DIGHTON, PLAINTIFFS IN ERROR.

versus

THE INHABITANTS OF FREETOWN.

Of the settlement of slaves.

THIS writ of error was brought to reverse a judgment of the court of common pleas for this county, rendered in December last by which the settlement of *Dinah Walker*, a pauper, was determined to be in *Dighton*.

Dighton vs. Freetown, in error.

The facts, on which the court below certify that the judgment was founded, were that the said *Dinah* was more than twenty years since lawfully married to one *Pomp Walker*, a black man, who had formerly been a servant to Col. *Elnathan Walker*, deceased, and was appraised at fifty dollars as part of the personal estate of said *Elnathan*: that the said *Pomp* lived with the administrator of said estate in *Taunton*, until the year 1779, when he was discharged from any further claims of the admimistrator for his services, and returned into the town of *Dighton*, and was married before stated, and continued to reside there until his death: that the overseers of the poor of *Dighton*, on the 11th, of December 1805, gave notice in writing to the overseers of the poor of *Freetown*, that said *Dinah* had become chargeable to said town of *Dighton*, and requested them to remove her to *Freetown*, and pay the expense that had accrued to *Dighton* for her support, to which notice the overseers of *Freetown* gave no answer in writing within two months from the time of receiving such notice, nor at any other time.

The writ of error was briefly spoken to by *Baylies* for the plaintiffs in error, and *Wheaton* for the defendants in error, and the opinion of the court was delivered as follows by

PARSONS, C. J. The common pleas have sent up a state of facts, on which the judgment was given, that we may revise, and, if necessary, correct their proceedings. The statement is not very accurately drawn up. It does not appear in what town *Pomp's* former master had his settlement; nor whether *Dinah* was in fact free or a reputed slave. She must therefore be considered by us as free when married; but as enough appears in the case to decide whether or not *Dinah's* settlement was in *Dighton*, we do not send the case back for a restatement.

Pomp being and continuing to be a reputed slave until 1779, he was settled in the same town with his master, deriving his settlement from him, as the slave was the personal property of his master, and could not be legally separated from him (1). *Pomp* was the slave of *Elnathan Walker at*

(1) *Vide Winchendon* vs. *Hatfield* in error. *Ante* 123.

Dighton *vs.* Freetown, *in error*

his decease intestate. He then, as the personal estate of the deceased became the property of *Peter Walker* the administrator, and acquired the settlement of his new master, which was in *Taunton;* and there he lived with, and served him until 1779, when he became free by the manumission granted by his master He then returned to *Dighton* and married the pauper *Dinah.*

As a settlement in *Dighton* could not then be gained by residence, *Pomp's* settlement remained in *Taunton,* and in the same town *Dinah* acquired a derivative settlement with her husband. Had *Dinah* been a slave when she married *Pomp,* and so under the legal controul of her master, it would have deserved further consideration, before it had been decided that she gained a new derivative settlement by her marriage. But the case does not state that she had ever been a slave, and we cannot presume it. So if *Pomp* her husband had been a slave when he married *Dinah,* it might well have been questioned if she had gained a new settlement with an husband, who being the property of another had no claim to the service of the wife; nor would she have had any claim on her husband for maintenance.

But in the case at bar, *Pomp* when free and not settled in *Taunton,* married *Dinah* a free woman, who also by marriage became settled in *Taunton. Dighton* therefore is not her place of settlement; and the judgment must be reversed with costs, which are given in cases like the present by the statute of 1793. c. 59. § 11.

DANIEL PIDGE *versus* EBENEZER TYLER & AL.

Under the provincial act of 9 W. 3. c. 7 for registering deeds and conveyances, in case of the absence or death of a grantor without acknowledgment of the deed, its execution must have been proved by two of the subscribing witnesses previous to its registry.

THIS was a real action, in which the demandant counted on his own seizin within thirty years. Upon trial before the *Chief Justice* at the sittings here after the last October term a verdict was found for the demandant, subject to the opinion of the court on the following report of the judge, who sat on the trial.

Pidge
vs.
Tyler & al.

"The demandant's title was founded on a deed of bargain and sale executed to him on the fifteenth day of April, A. D. 1766, by *John Pidge*, who was then seized in fee of the demanded premises, in the presence of two subscribing witnesses, *John Pidge*, jun. and *Benjamin Ide*. It was not acknowledged by the bargainer in his life, but after his decease at an inferior court of common pleas holden at *Taunton*, within and for the county of *Bristol*, on the second Tuesday of September, A. D. 1773, the said *Benjamin Ide* made oath in court that he was present and saw *John Pidge*, the bargainor, sign, seal and deliver the said deed, and that *John Pidge*, jun. the other subscribing witness, signed as a witness at the same time, which affidavit of the said *Ide* was endorsed on the said deed in open court, and a record thereof made by the clerk of the same court. When the said affidavit was made, the said *John Pidge*, jun. was living in the then colony of *Connecticut*, but at the trial he was dead. The said deed, with the said affidavit endorsed thereon, was on the 16th day of September, A. D. 1773 duly registered.

Now if the court are of opinion that this deed thus authenticated, without any further proof, was duly and legally read in evidence to the jury, then judgment is to be entered on the verdict: otherwise the verdict is to be set aside, and a general verdict is to be entered for the tenants, and judgment accordingly."

The question upon this report having been submitted without argument to the decision of the court, their opinion was now delivered by

PARSONS, C. J. The deed in this case was objected to at the trial as not within the provincial statute of 9 *W.* 3. c. 7. regulating the conveyances of land. It was admitted *de bene esse* for the purpose of reserving the question for the opinion of the whole court, if the demandant obtained a verdict. The jury found the issue for him, and we are now to decide on the validity of the objection; the parties having agreed that if the deed ought not to have been admitted, the verdict shall be set aside, and a general verdict be entered for the tenants.

It is well known that livery and seizin were necessary to pass lands at the common law, when the conveyance was by feoffment. This was required to give notoriety to the alienation by preventing secret transfers of the freehold.

After the introduction of uses, which passed by grant, and which were enforced by a court of equity, conveyances to uses were as general as they were mischievous, the freehold being in one man, while the use or beneficial interest was in another. To remedy this inconvenience the statute of uses [27 *H.* 8. c. 10.] was passed, by which the freehold and use were necessarily united in the same person. In consequence of this statute the owner might sell the use, and the statute transferred the freehold, so that the alienation might be private, attended with no circumstances of notoriety.

To prevent this mischief, at the same session of parliament the statute of enrolments (27 *H.* 8. c. 16.) was passed. The statute prohibited the passing of lands by bargain and sale, unless the same was by deed indented and enrolled within six months in one of the courts at *Westminster*, or in the county before certain public officers therein mentioned. On the construction of this statute, the land, after executing the indentures, did not pass before the enrolment: but after the enrolment within six months the bargainee was seized by relation from the execution.

That this statute was passed to give notoriety to alienations by bargain and sale is manifest, because it is holden that although the first bargain and sale be not enrolled, yet a second conveyance to one who in fact had notice of the prior conveyance is fraudulent and void. The statute extends but to one kind of conveyance, and does not require an acknowledgment of the bargainor, or make any express provision that the deed shall be good against him and his heirs without enrolment.

As the intent of the statute was to give notoriety to bargains and sales of land, if a fictitious conveyance not executed by the bargainor should be enrolled, greater mischiefs would arise, and the public records might deceive in place of informing intended purchasers. The officer therefore whose duty it was to make the enrolment, must have evidence

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that the instrument produced for enrolment had been in fact executed. Hence arose in *England* the acknowledgment of the deed by the bargainor; which was made either in the court where the deed was to be enrolled, or before the officer, who was directed to make the enrolment, as the best evidence of the execution: although there are cases, in which the enrolment has been holden good when the deed was otherways authenticated than by acknowledgment (1).

Thus stood the law when our ancestors emigrated, and settled the colony of *Massachusetts Bay*. To give publicity to the conveyances of lands was soon an object of their attention. In 1641, after the colony had been formed into counties, and county courts created, an ordinance passed making the clerk of the county court recorder, and directing him to enter all grants and sales of land, with the names of the grantors and grantees, thing and estate granted, together with the date thereof. It was also ordained that all grants, sales and mortgages of land *where the grantor remains in possession*, shall not be in force except against the grantor and his heirs, unless the same be acknowledged before some magistrate, and be recorded.

Unless express provision had been made for the acknowledgment before a magistrate, every grantor must have repaired to the recorder in the shire town, to acknowledge the deed before him. For before he could record the deed, he must have regular evidence that it was a deed executed by the grantor, of which his acknowledgment would be the best proof. In a young country this must have been laborious and inconvenient, and tending to embarrass the alienation of lands. The legislature therefore prevented this embarrassment by directing the recorder to record on the authority of the certificate of a magistrate, to one of whom access could every where easily be had. This ordinance extended to cases only where the grantee remained in possession.

Afterwards in 1651, another ordinance declared that no alienation of land should be good unless by deed executed with livery and seizin, unless the deed be acknowledged and

(1) *Godbolt*, 270

recorded. Thus the acknowledgment authorized the recording of the deed, and the record was made an act of notoriety of the alienation equivalent to the delivery of seizin at the common law.

Thus stood the law under the colonial charter. If the grantor remained in possession, the conveyance must be by deed acknowledged and recorded, and was not otherwise good, except against himself and his heirs. But if the purchaser entered into the possession on the alienation, the conveyance must be by deed, either with livery of seizin, or what was considered as an equivalent, by deed acknowledged and recorded. But no time for making the record was limited.

After the repeal of the colonial charter, and the grant of the provincial charter, the legislature made a new provision for the registry of conveyances of land. By the provincial statute of 9 *W.* 3. c. 7. it was enacted that any conveyance of land by deed executed by the party granting the same, having good and lawful right thereto, and acknowledged by the grantor before a justice of the peace, and recorded at length in the registry of the county, shall be valid to pass the same, without any other act or ceremony in the law whatever. And that no conveyance of land shall be good in law to hold the same against any other person but the grantor and his heirs, unless the deed be acknowledged and recorded. And if the grantor live in parts beyond the sea, or be removed out of the province, or be dead before the deed be acknowledged, proof of the execution by two of the subscribing witnesses before any court of record shall be equivalent to the acknowledgment by the grantor.

This statute continued in force until the revolution, and the merits of the present question depend on the construction of it. These provisions in some respects differ from the colonial ordinances. Although the deed must be acknowledged before it can be recorded, yet instead of a magistrate is substituted a justice of the peace, who was not an officer known under the first charter.

Livery of seizin is in all cases rendered useless, and lands without it will pass by deed unacknowledged, so as to bind the grantor and his heirs. As the object of acknowledgment

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was to authorize the recording, and the recording was substituted to livery of seizin, as giving equal or greater notoriety, it is unnecessary to record the deed to bind the grantor, because he is conusant of his own conveyances, and his heirs must be bound by his acts.

That the acknowledgment is intended to authorize the register to record the deed, is further apparent from the necessity the law imposes on the party producing and claiming under a deed acknowledged and recorded to prove the execution of it, in the same manner as if it had not been acknowledged. And that it is the recording of a deed, which is the legal equivalent for livery of seizin, as creating sufficient notoriety, results from a series of decisions, by which a second purchaser, having knowledge of a prior conveyance by a deed unrecorded, shall not hold the land against the first purchaser.

The recording a deed has its effect here from the provisions of the statute, and unless these provisions are conformed to, the conveyance is not good, but against the grantor and his heirs, except in cases of fraud or prior notice. But the statute has not declared that a deed recorded shall have effect without any other ceremony in the law. The deed must first be acknowledged by the grantor, as the regular evidence to authorize a record.

This is the general rule and, and the provisions of the statute clearly shew that this rule must necessarily be complied with, except in the cases specially provided for. One case is the absence or death of the grantor. And in this case the proof of the deed, before it can be regularly recorded must be by the oath, not of one, but of two of the subscribing witnesses in a court of record. The other case is where the grantor shall refuse to acknowledge the deed. In this case the relief is by the commitment of the grantor until he shall acknowledge his deed; and after proving the deed before a justice by *one* or more of the subscribing witnesses, by filing a copy in the register's office, and not even in this case by recording the original.

There seems to be no room for us, by any rules of construction, to consider a deed unacknowledged by the grantor, and not proved by two of the subscribing witnesses as

regularly recorded, so as to entitle it, as against strangers, to the effect of a deed within the statute. For the statute introduces a new law, by which a conveyance by deed executed and acknowledged by the grantor, or the execution proved in a court of record by the oaths of two of the subscribing witnesses and recorded shall, if the grantor be seized, pass the freehold to the grantee, who shall be deemed to be in the legal and actual possession, so that without entry he may convey the same to any other person, who, by force of the conveyance, if it be in like manner acknowledged or proved and recorded, will be deemed actually seized.

In *England*, where generally the deed must be acknowledged before enrolment, if there are more parties than one to the deed, an acknowledgment by one of the parties is sufficient to obtain an enrolment, which is good as to the other grantors(2).

And the same construction may be given to this statute. For clearly the grantee is entitled to have the deed recorded as the deed of the acknowledging grantor; and if it be regularly recorded, the record will give equal publicity to the conveyance as to all the grantors, and so the intent of the statute will be satisfied.

Had the deed in question been made by two grantors, and acknowledged by one of them, or had it been executed under the present revised statute of 1783, c. 37. there would have been no question. By this last statute of the legislature, probably aware of the great strictness of the former statute, have authorized the recording of a deed by the proof in a court of record by one of the subscribing witnesses, when the grantor was absent, or had died not having acknowledged it. This alteration shews that by the language and intent of the former statute the proof by two witnesses was necessary.

Upon the whole, as the deed in the present case was not acknowledged by the grantor, nor proved in a court of record by the oaths of two of the subscribing witnesses, it was recorded without any legal authority, and cannot therefore have the effect of a deed acknowledged or proved and recorded

(2) *Taylor* vs. *Jones*, 1 *Salk.* 389.

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within the statute: and not having that effect, it ought not to have been read to the jury.

Before the court ordered an entry to be made, that the verdict be set aside, and a general verdict entered for the tenants, the demandant stated that since the trial he had discovered evidence to maintain the issue on his part without the deed in question, and moved that a new trial might be ordered. The tenants consenting, the verdict was set aside, and a new trial was granted.

ABIATHAR PADELFORD AND AL.

versus

WILLIAM H. BOARDMAN.

When in the course of a voyage a ship ensured, being damaged by winds and storms, voluntarily seeks aport to refit, the expenses consequent thereon, including the wages and provisions of the crew during the detention, are a general average: but the repairs are a distinct charge upon the vessel.

THIS was an action upon a policy of insurance, which came before the court upon a statement of facts agreed by the parties at October term, 1806. It was submitted to the court without argument, and standing continued *nisi* from this term, the following opinion of the court, in which the material facts and points of the cause appear, was delivered at *Salem* in November by

SEWALL, J. The demand of the plaintiffs is upon a policy of insurance subscribed by the defendant to ensure the schooner *Alpheus* and *Nancy*, valued at 4000 dollars, for a voyage from *Boston* to *Amsterdam*, from thence to the *Cape De Verd* Islands, and from thence to her port of discharge in the *United States*.

The policy contains this clause: "But the assurers are "not liable for any partial loss on sugar, flaxseed, bread, to- "bacco or rice under seven per cent.; nor on salt, hemp, "flax, grain, fish, fruit, hides, skins, or other goods deemed "perishable in their own nature, unless the damage happen "by stranding or bilging, and amount to seven per cent.; "nor on any other articles, *or on vessel or freight, under five "per cent. excepting in all cases general average.*"

The interest of the insured in the vessel is admitted, and the other facts agreed, which are material to the decision of

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the court in this case, are that in the passage from the *Cape De Verd* Islands to *Rhodels-land* in the *United States*, the vessel insured was damaged in her sails and rigging by the winds and storms, and in consequence it became necessary to put into *Norfolk* in *Virginia* to refit: that she was there repaired, and afterwards completed the voyage insured. The expenses in repairing the damages suffered by the vessel, and in making a port, and in the wages and support of the crew during the detention, which it is agreed was for the interest of the concerned, and the amount of the cargo and freight preserved, are particularly stated.

The repairs of the vessel, deducting the usual discount upon new articles to replace old, amount to 156 dollars, 30 cents: and the expenses in seeking a port, and in the detention to refit, including the wages and provisions of the crew, amount to 245 dollars, 19 cents. If the repairs and expenses are wholly chargeable to the vessel, the underwriters are liable for a loss of $7\frac{39}{100}$ per cent. of their subscriptions; but if the repairs are chargeable distinctly to the vessel, and the other expenses are a general average, the partial loss upon the vessel being less than five per cent. is excluded by the policy, and not recoverable: and for the average the underwriters upon the vessel are liable for a loss of $3\frac{48}{100}$ per cent. upon their subscriptions, if the items of wages and provisions for the crew during the detention are to be allowed.

Memoranda of a similar import with the clause cited from this policy are usual in *English* and other foreign policies. The exception, more particularly applicable in this case, is frequently expressed in *English* policies in these words, "*The ship and freight are warranted free from average* "*under three per cent. unless general, or the ship be stranded,*" where average means a particular partial loss(1).

In the policy under consideration the underwriters are not liable for any partial loss upon vessel or freight under five per cent. excepting a general average.

Partial loss implies a damage sustained by the ship or cargo, which falls upon the respective owners of the property

(1) *Marsh.* 139, 140.—*Park.* 111. 114.

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so damaged: and when happening from any peril insured against by the policy, the owners are to be indemnified by the underwriters, unless in cases excepted by the express terms of the policy, as in the case at bar by an exception provided against trifling demands.

General average expresses that contribution to a loss or expense voluntarily incurred for the preservation of the whole, in which all who are concerned in ship, freight and cargo are to bear an equal part proportionable to their respective interests. And for the loss incurred by this contribution, however small in amount, the respective owners are to be indemnified by their insurers.

The clause "*free from average, unless general, or the "vessel be stranded,*" part of the memorandum usual in *English* policies, excluding certain risks, has been the subject of discussion in several decisions, which are reported. In *Cantillon* vs. *London Assurance Company*, before lord chief justice *Ryder*(2), and *Bowring* vs. *Elmslie*, before lord *Kenyon*(3), and in the more recent case of *Burnett* vs. *Kensington*(4), before him and the other justices of the king's bench, when all the previous decisions were cited and examined, the phrase "*unless the ship be stranded,*" was construed a condition, which having happened, the insured was let in to prove a partial loss otherwise excluded by the exceptions, and although not certainly occasioned by the stranding. In *Wilson & al.* vs. *Smith*(5), decided by lord *Mansfield*, justice *Buller*, &c. confining the authority to the point decided, "*unless a general average*" was construed an exception; and in the case of *M'Andrews* vs. *Vaughan*(6) before lord *Kenyon*, the decision must be understood to have been upon the same construction. And in those cases the insured was not let in to prove a partial loss within the exceptions, although accompanied with a general average.

The clause cited from the policy in the case at bar is not liable to these uncertainties; and in the case of general aver-

(2) *Cited* 3 *Burr.* 1553. *Marsh.* 140.
(3) *Marsh.* 146.
(4) 7 *Term R.* 210. 216.
(5) 3 *Burr.* 1550.
(6) *Marsh.* 150.—*Park.* 114.

age is obviously an exception from the enumerated exceptions, not otherwise affecting them, and is perhaps inserted from abundant caution, where partial loss is apparently to be construed in strictness to intend a damage or direct loss in the excepted cases.

In the case at bar the partial loss or damage sustained by the vessel, and the contribution to which the same property became liable by the expenses voluntarily incurred in seeking a port to refit, were occasioned in the first instance by the same accident. The cases are distinguished however by the terms of the policy, and in the nature of the thing. The damage sustained by the vessel is the partial loss, but the contribution is a charge to which the property saved is made liable by the marine law: for the former being under five per cent. the underwriter is not liable, by an express exception, which is not extended to the latter. And that these are not to be blended by any constructive inference, appears in the several adjudged cases that have been mentioned. And this opinion is conformable to the usage of merchants and insurers, as it has been understood upon enquiry.

Considering the general average as the only loss recoverable in this case, it becomes important to ascertain the items to be allowed in estimating it; or rather, whether the wages and provisions of the crew during the detention from the usual course of the voyage are proper items in the general average. It is understood that merchants and insurers are not agreed upon this question, and that it is not determined by uniform usage and practice.

The rules of insurance admitted with us, chiefly in conformity to *English* decisions, have determined that extraordinary expenses incurred during the course of a voyage, or an unavoidable detention from an accident which interrupts it, are charges or losses upon the freight and profits of the voyage, and are not recoverable against an insurer upon the ship or her lading(7): And upon this general principle, that every loss is to be referred to its immediate occasion and subject-matter. The expenses of a detention are no direct

(7) *Marsh.* 617. 622.

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diminution of the value, and are therefore not recoverable against the insurer of the vessel; but they diminish the value, and are therefore recoverable against the insurer of the freight. Thus in *Fletcher* vs. *Poole*(8), before lord *Mansfield*, the wages and provisions expended during a detention to repair in a port, to which the vessel had been driven by distress of weather, were held not recoverable against an insurer upon the vessel. And in *Eden* vs. *Poole*(9), before justice *Buller*, a loss by wages, provisions and demurrage during a detention to repair in a port, to which the master bore away, in consequence of distress of weather, and the threatnings of the crew, was held not recoverable upon a policy on ship and goods.

Both these cases exclude the circumstance of a voluntary and deliberate resort to a port for the particular purpose of refitting, with a view to the common safety of the vessel and cargo, and to avoid the impending danger of continuing the voyage without some necessary repairs.

In the case of *Lateward* vs. *Curling*(10), before lord *Mansfield*, a loss by wages and provisions expended during a detention of the ship in going from *Bengal* to *Bombay* to repair, was held not to be recoverable against an insurer upon the ship: but he said there might be cases where these expenses ought to be allowed as exceptions to the general rule, and he is reported to have instanced as exceptions cases where the expense was absolutely necessary and occasioned by some perils insured against by the policy; circumstances by which no case could be distinguished, being essential to every recoverable loss. It is more probable therefore that lord *Mansfield* distinguished the supposed exceptions by circumstances applicable to cases of general average.

In *Da Costa* vs. *Newnham*(11), the ship insured, having met with an accident in the course of her voyage from *Leghorn* to *London*, was obliged to put into *Nice* to repair. Justice *Buller* considered this a case of general average, and the insurers upon the ship were holden liable, in this view,

(8) *Marsh.* 620. *Park.* 52.
(9) *Marsh.* 621. *Park.* 54.
(10) *Marsh.* 464. *Park.* 125.
(11) 2 *Term R.* 407.

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among others, for the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs; the ship having been obliged to go into port for the general benefit of the whole concern. The crew had been discharged, and therefore it was not necessary in that case to decide the precise question, whether their wages and provisions were recoverable in a case of general average. And upon this particular question there seems to be no complete authority from any adjudged case in the *English* reports.

Magens enumerates the expenses and damages, which according to the ordinance of *Hamburgh*, and some other foreign ordinances, constitute and are commonly accounted a general or gross average (12). Among which are extraordinary pilotage, and charges which a ship shall be at from springing a leak, or being obliged to take shelter in a harbour, by having received some other damage. Included in this article are sailors' victuals and wages; and upon this subject *Magens* cites *Langenbeck's* annotations, and with him distinguishes a detention occurring in the course of the voyage, or by an accident which immediately interrupts it, which he instances in the case of a ship accidentally surprised and frozen up at *Petersburgh* by an unexpected frost, when sailors' wages and victualling during the detention are not to be made good by a general average, but are to be borne by the ship alone. And a like detention happening, when the master after sailing had, in consequence of damage received in a storm, found it necessary, and determined to seek a proper place to repair, where he was afterwards frozen up, in such case the expense of victuals and wages are to be admitted in a general average.

Beawes (13) lays it down as an established principle and usage, that where a ship is forced to enter a port, to repair the damage she has suffered in a storm, being unable to continue her voyage without apparent risque of being lost: that

(12) *Mag.* 64—69.

(13) *Lex. Merc.* 161.—*Marsh.* 469.

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in such case the wages and provisions for the crew, from the day it was resolved to seek a port to refit the vessel, to the day of her departure from thence, with all the charges of unloading and reloading, anchorage, pilotage, and every other expense incurred by this necessity, shall be brought into a general average.

Marshall in citing this observes, that this point has not been expressly decided in any *English* court of justice: yet that the principle seems to have been acceeded to at different times by judges of great authority.

A detention in consequence of a master's seeking a port to avoid an enemy, is mentioned by *Bynkershoek* as a case of general average, in which sailors, wages and provisions were allowed by the decisions of the several courts in *Holland* (14).

A liberal construction in this respect appears conducive to the interest of insurers, in the benefit they derive from every reasonable precaution against impending and extraordinary risks, such as the continuing at sea with a vessel disabled in her sails and rigging. By rendering the concerned liable in a general contribution to defray the extraordinary expenses of seeking a port, and of the detention there to refit, the hazard from opposing interests is avoided; and a security common to all the concerned is purchased, as it ought to be, at their common risk and expense.

Upon the whole there may be some difficulty in deciding under the circumstances of a particular case, whether a detention by any accident, happening after the commencement of a voyage, is or is not a case of general average. But when the case is established to be of that nature, and sailors' wages and provisions make a part of the expense necessarily incurred, this seems a sufficient reason for allowing them. The text writers, and the ordinances and decrees of several great commercial republics favour it, and there is no opposing authority, applicable to the case supposed, in the decisions of this court, or of the courts of *Great Britain*, from whom our rules of maritime law are generally derived. But the definition of a general average, received in the courts of

(14) *Bynk. Quest. Jur. Priv. L.* 4. c. 25. 26.

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both countries includes the wages and provisions of seamen, in cases like this new under consideration.

In the case at bar, the seeking the port of *Norfolk* to refit, and the stay there are agreed to have been a deliberate and necessary departure and detention from the course of the voyage for the benefit of all concerned. This was therefore a case of general average, and the sailors' wages and provisions, forming suitable items of the expenses thereby incurred, are to be allowed: and the plaintiff is to have judgment, in which his damages are to be reckoned at $3\frac{48}{700}$ per cent.* of the defendant's subscription, with interest on the amount from the time the loss became due.

Padelford and *Tillinghast* for the plaintiffs.

Sproat for the defendant.

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* This average was produced as follows, *viz.*

	Dollars.
Vessel valued at	4000
Cargo	2300
Freight	750
	7050

Partial loss chargeable to the vessel, *viz.*

Rigging	45
Sails and making	100
Masts	69,57
Spunyarn	19,87
	234,44
Deduction on new materials for old $\frac{1}{3}$	78,14
	156,30

General average to be adjusted by contribution, *viz.*

Pilotage 40.—Entry 3,50—Harbour-master 1,25	44,75
Surveys 13,98—Wharfage 19,50—Small stores 6,11	39,59
Notary 9,92—Provisions 30—Wages 100—Commissions 20,93—	160,85
	245,19

As 7050 : 245,19 : : 4000 : 139,11

4000 : 139,11 : : 100 : 3,48

COMMONWEALTH *versus* ELEAZAR WALKER, JUN.

THIS was a writ of *certiorari* entered at this term, and briefly opened by *Tillinghast* for the commonwealth, and *Sproat* for the defendant, and being continued *nisi* for advisement, the opinion of the court was delivered the following week at *Plymouth* by

A private in the militia is not discharged from the company to which he belongs by an absence of six months from the brigade, without an intention of changing his domicil.

If a private in a standing company enlist in a voluntary corps, although the standing company consist of less than sixty four effective privates, or by such enlistment is reduced below that number the enlistment is not void, and such private is not liable to do duty in the standing company, unless restored thereto by the brigadier general.

PARSONS C. J. The defendant has by a writ of *certiorari* removed the proceedings of a justice of the peace, by which the defendant was found guilty of neglect of military duty in not attending a muster on the fifth of May, 1807, as a private in a company of foot commanded by Capt. *Arnold*, belonging to Col. *Williams'* regiment.

As the defence was chiefly a matter of law arising on the facts in the case, the justice has stated those facts in his proceedings, and the evidence given to support them. The defendant insisted before the justice that he was, at the time of the muster, a private duly enlisted and enrolled in Capt. *Danforth's* company of artillery in *Norton*, and in fact doing duty in that company on the day of the muster, which duty, if he had neglected, he would have been liable to a fine. To make out his defence it was proved that he lived in *Norton*, having in 1806 been enrolled in Capt. *Arnold's* company of foot, then commanded by Capt. *Hodges*: that in the same year he resided for six months in *Boston*, during which time he was struck off the roll: that while in *Boston* he enlisted and was enrolled in the said company of artillery, from which he had never been discharged.

To this defence it was objected, that his enlistment into the artillery company, while he resided in *Boston*, was illegal and void: also that Capt. *Arnold's* company of foot to which he had belonged, was reduced below *sixty-four* effective privates, and the enlistment was for this reason void. There were some other exceptions taken by the defendant to the justice's proceedings, which it is not necessary to notice.

These objections to the defendant's defence we have taken a little time to consider, and shall now give our opinion.

By the thirteenth section of the statute of 1793, c. 14. every artillery company shall be formed from volunteers from

the brigade; and if the defendant at the time of his enlistment belonged to that brigade, he might unite himself to that company. Now he lived at *Norton* within the limits of the brigade, but had absented himself from that town, and resided in *Boston* six months; after which he again returned to *Norton*. On these facts he must be considered as always belonging to that brigade, his absence being temporary, without any intention of changing his domicil, and his home during his absence being in *Norton*. We are therefore satisfied that this objection is not sufficient to impeach his enlistment into the artillery company.

It is said that during his absence he was struck off the roll of the foot company; but he is not answerable for the conduct of the captain. His temporary absence on lawful business might lawfully excuse him from doing duty in the company during such absence, but his name might still have remained on the roll. If in fact when the captain of the artillery company had enlisted him, he did not belong to the brigade; whether the enlistment would have been void, or whether the captain enlisting him would have been answerable for a breach of military duty, will be considered in noticing the second objection.

By the fifteenth section of the statute before cited, no officer of any corps of artillery shall enlist any men belonging to a standing company, for the purpose of forming or recruiting such corps, when by means thereof such standing company would be reduced to a less number than sixty-four effective privates. And the commanding officer of such corps shall, in April annually, deliver to the commanding officer of the regiment a list of the names of all the men belonging to his corps.

Now the second objection is that Capt. *Hodges* had struck off the roll of his company the names of a number of privates, whom he judged unfit for duty; by the enlistment of the defendant that company either was reduced below sixty four effective privates, or did not then consist of that number; and therefore the enlistment is void.

The correctness of the justice's opinion as to the fact is disputed by the defendant: but admitting the correctness of it, we are satisfied that he was mistaken in his inference

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that the enlistment was void. The privates of the standing companies do not keep the rolls, nor can they be presumed to be conusant of the number of men respectively born on them. They apply to the commanding officer of a regular voluntary corps to enlist: he enlists them, and enrols their names as belonging to his corps. The men are then obliged to do duty in that corps: they are liable to a penalty for neglect, and they cannot avoid the penalty by denying the legality of their own enlistment. If the commanding officer of the corps had acted illegally in enlisting the men, he is answerable in a court martial: and the captain of the standing company may apply to the brigadier general, who will restore to him his men improperly enlisted by discharging them from the voluntary corps(1). And if the voluntary corps, in which a private may enlist, should not be within the brigade, it is much more reasonable to charge the officer irregularly enlisting him, and to obtain a discharge of the private by the orders of the brigadier, than to subject the private to a double penalty, or to a lawsuit to determine the limits or extent of a brigade.

In the case at bar, if the justice's opinion of the law was correct, the defendant must pay a fine for not doing duty in a foot company, when he in fact was doing duty in a corps of artillery, which he could not avoid without incurring a penalty for his neglect.

For these reasons we are satisfied that the conviction was wrong, and that the proceedings must be quashed.

We observe that the justice has made a statement of the facts in the form of exceptions made by the defendant. This is not the regular method. On the hearing of these militia causes, the justice is not obliged to receive a special plea, or to file exceptions: but it is very proper, when the defence is matter of law, for him to state the facts. And he may conveniently do it in this form:—That on hearing the parties the following facts were proved or admitted, stating them—then he may proceed to convict or acquit the defendant according to his own opinion of the law and evidence.

Proceedings quashed.

(1) *Vid. Stat.* 1799, c. 73. § 2.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF PLYMOUTH,

OBTOBER TERM, 1808.

AT PLYMOUTH,

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, } JUSTICES.
HON. ISAAC PARKER, }

JOHN CARVER *versus* JEDIDIAH MILLER.

THIS was an action of the case upon several promises. Upon *non assumpsit* pleaded and joined, the cause was tried before *the chief justice*, at the sittings after the last October term in this county, and a verdict taken for the plaintiff for the sum demanded by him, subject to the opinion of the court upon a case stated. The declaration is stated, and the facts agreed are recited by *the chief justice*, in the following opinion of the court, delivered by him at this term; the cause having been submitted to the court without argument.

PARSONS, C. J. This action is brought to recover of the defendant compensation for repairing a corn-mill, of which the parties were, when the action was commenced, tenants in common. The declaration contains several counts.

In the *first*, the plaintiff declares that on the first of June, 1802, he was seized of three fourth parts of the mill in fee,

The common law writ *de reparatione facienda* lies for a tenant in common or joint-tenant against a cotenant only, and not against the reversioner.

Under the staute of 1795, c. 74. §6. the only remedy against a par owner of a mill, who refuses to repair, is by reimbursement out of the profits: and this remedy does not lie against his heirs or assignees.

Where a tenant for life of a part of a mill agrees that his cotenant shall repair, and reimburse himself out of the profits of the mill, the profits are not answerable after the death of the tenant for life.

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and one *Joanna Lucas*, of the other fourth part for term of her life, the reversion of which belonged to the defendant; that the mill being then out of repair, *Carver* and the tenant for life agreed that it should be repaired; and as she was unable to repair her fourth part, *Carver* should make all the repairs, and should receive her fourth part of the profits until he was reimbursed out of it one fourth of the expenses of the repairs; that *Carver* accordingly made all the repairs, one fourth part of the expenses of which amounted to 78 dollars 63 cents with the interest, and received all the profits so long as the tenant for life lived, and afterwards until the 4th of February, 1805, when the defendant entered, who has ever since taken his fourth part of the profits, leaving the sum of 36 dollars 45 cents, part of the expense of repairing the fourth part, in arrear and unpaid: of all which the defendant has had notice, but has refused to pay the sum in arrear.

The *second* count is a *quantum meruit* for repairing one fourth of the mill, the property of *Miller*, done at the request of *Joanna Lucas*, the tenant in possession and which *Miller* promised to pay.

The *third* count is a general *indebitatus assumpsit* for money laid out and expended by the plaintiff for the defendant's use.

The *fourth* count is also a general *indebitatus assumpsit* for money had and received.

The verdict in this case was found by the consent of the parties subject to the opinion of the court on the following facts: That in July, 1802, *Carver* was seized of three fourth parts of the mill in fee, and *Joanna Lucas* of the other fourth part thereof as tenant in dower, the reversion in $\frac{6}{7}$ of which belonged to the heirs of her husband, *Barnabas Lucas*, and in the other $\frac{1}{7}$ to *Miller*. That *Carver*, and *Joanna Lucas*, then agreed that *Carver* might repair the mill, and reimburse himself out of the profits. That he thereupon repaired it, one fourth of the expenses of which are truly alleged in his declaration, and afterwards he received all the profits during *Joanna Lucas*' life, and afterwards until the fourth of February, 1805; when *Miller*, having purchased the interest of the heirs of *Barnabas Lucas*, entered and has received one fourth of

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the profits ever since leaving the sum of 36 dollars 45 cents, part of the expenses of repairing the said fourth part, unpaid and in arrear. The question submitted to the court is, whether in this action *Carver* can recover against *Miller*, the said arrears, or any part of them. And the verdict is to be made conformable to the opinion of the court.

In examining the facts, there does not appear to have been any express promise of *Miller* to reimburse *Carver* any part of the expenses of the repairs. And if *Carver* can recover in this action, it must be maintained in consequence of some legal obligation imposed on *Miller*, by the common law, or by the statute of 1795. c. 74.

At common law, if there be two jointenants, or tenants in common of a wood, or of arable land, the one has no remedy against the other to make enclosures or repairs for the safeguard of the wood, or crop. But a house or a mill, is of higher legal consideration : and one jointenant or tenant in common may have a writ *de reparationefacienda* against the other : for each one is holden to repair and sustain his house or mill(1).

Whether this maxim of the common law, as applied to mills, is in force here may be doubtful, especially since the provincial statute of 7 *Ann.* c. 1. was passed, which was revised by the statute before mentioned. In the early settlement of this country, mills were erected over streams of water then sufficient, but which by the clearing of the country have so far failed, that the mills could now be wrought but a small part of the year ; and the profits would not be a sufficient inducement to keep them in repair. To this discouragement may be added the erection of new mills in the neighbourhood in more convenient situations. And as to saw-mills, the consumption of all the timber in their vicinity has rendered many of them useless. As there have been many mills heretofore erected, which could not now be wrought with adequate profit, it would be unreasonable to enable any individual part-owner to compel his partners in all cases to keep their mill in repair. And the statute has

(1) 11 *Rep.* 82. *b.—Co. Litt. B.* 3. *c.* 4. § 323.

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accordingly provided, that if a part-owner will repair against the consent of his partners, he shall look to the profits only for his reimbursement.

But it is not necessary now to determine whether this common law remedy can or cannot be applied at this time by our courts: for the action of contribution lay by a tenant in common or jointenant against his co-tenants only, and not against a reversioner. For the consideration, on which the writ is founded, is the perception of the profits by all the parties to the action: and he in remainder or reversion is not entitled to the profits(2).

If therefore this action can be maintained, it must be supported on the statute of 1795, c. 74. It is not very easy to give a construction to some parts of this act, so far as it provides a new remedy. By the sixth section, if the major part of the proprietors in interest of any mill shall agree to repair or rebuild, they may do it, and they shall be reimbursed out of the profits of the mill, in case any proprietor shall refuse to agree to the repairs or rebuilding, or to pay his proportion of the expenses: and they may have their actions against the deficient proprietor to recover the same. But any particular contract to repair or rebuild, entered into by the proprietors, shall not be avoided by this act.

It seems therefore that when all the proprietors contract to repair or rebuild, and to pay the charges, a remedy must be had on the contract, if it be broken, and not on the act. But if any proprietor shall refuse to contract, then if the mill be repaired or rebuilt at the charge of the greater part in interest of the proprietors, they shall be entitled to a reimbursement out of the profits of the deficient proprietor, and may maintain an action against him: but if his profits should be insufficient, they can have no other remedy. And the action is not given against the heirs or assignees of the deficient proprietor, but against him only: and consequently the profits are not charged, by the words of the statute, if his share of the mill shall be vested in others.

From the facts in this case there was no refusal to repair or to pay on the part of the tenant in dower, but an express a-

(2) 5 *N. B.* 295.

greement that *Carver* should make all the repairs, and receive he profits until he was paid. He cannot therefore claim any benefit under this statute : and if, by the death of the widow, he is no longer entitled to all the profits under his contract, and suffers a loss, it is in consequence of the nature of his contract, which, as to his receipt of the profits, was determined by the death of the tenant in dower. He is no longer entitled to those profits, or to their value, unless the tenant could by her contract charge them after her decease in the hands of the reversioner.

But we know of no legal principle, on which she could thus charge them ; and a power of this kind would be very unreasonable. She held this estate subject to impeachment for waste ; and if through her refusal or neglect the mill had been suffered to decay, it would have been waste, for which she would have forfeited the place wasted, and treble damages, to be recovered by the reversioners. If she could, by charging the profits in the hands of the reversioners, repair the mill, she would protect herself against them at their own expense. We are therefore satisfied that the plaintiff cannot call upon the reversioners for the expenses of any part of the repairs, which he made pursuant to his express contract with the tenant in dower.

When a deficient proprietor is answerable in an action to the proprietors who have repaired, he cannot be holden to pay beyond the value of the profits he may receive. If therefore an action of the case was the proper suit, the declaration ought to contain an averment of the value of the profits received, to furnish a measure for the damages to be recovered. This averment has not been made by the plaintiff ; nor does it appear either in the declaration, the verdict or the case agreed, what profits the defendant received. But the proper action is account for the profits, charging the defendant with being the bailiff of the plaintiff ; for if the plaintiffs have a lien upon them, the defendant must be liable to account for what he has received.

If such deficient proprietor, being tenant in fee, shall after the repairs made aliene or die, before the charges are reimbursed, it may deserve consideration, whether within the equi-

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ty, although not within the words of the act, his assignees or heirs may not be holden to account. For the deficient proprietor might lawfully have charged his interest in the mill with the reimbursement, and they hold the estate under him. But it is not necessary now to decide this point: for the reversioner does not claim either as heir or assignee.

By the seventh section of the statute it is enacted that, for the purpose of repairing or rebuilding under this act, a guardian of a minor, a husband of a *feme covert*, tenant for years, for life, in mortgage, or in tail, who are entitled to receive the profits of the mill, shall be deemed proprietors. And all advances made by them respectively shall be recoverable by action against the minor, heirs of the *feme covert*, remainderman, reversioner, or the other party to the mortgage, if not adjusted and paid by agreement. This section, whatever may be its construction, cannot apply to the present action, for it is not brought by tenant in dower against the reversioner for advances by her made.

The intent of this section is certainly obscure. It is easy to understand that guardians shall be reimbursed their advances out of the estates of their wards, and tenants for years in some cases by their landlords. Perhaps the husband ought sometimes to be repaid by the heirs of his wife after her decease, if he was not tenant by the courtesy. But it is difficult to conceive why tenants for life, answerable for waste, should be paid for repairs which they were obliged to make under the penalty of forfeiting the estate with the treble damages. If they have voluntarily incurred expenses not required by their tenures, and of which he in remainder or reversion will have the benefit, for these expenses a repayment may be intended. But why tenant in tail should be provided with a remedy, when he may at his pleasure become tenant in fee simple, requires some explanation, unless the mill should not be worth the expenses: and then the mill ought not to have been repaired.

It is unnecessary to consider the other counts. For the second count is quite unsupported, *Miller* not having the property of the quarter of the mill, when the repairs were made,

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A general *indebitatus assumpsit* cannot be maintained upon this statute, and there is no express promise admitted.

As we are of opinion that the facts agreed do not support either of the counts, the verdict must be set aside, and a general verdict entered for the defendant, and judgment be rendered accordingly.

Sproat and *B. Whitman* for the plaintiff.

Padelford and *Thomas* for the defendant.

EX PARTE JEDIDIAH MILLER.

This court will not grant a *certiorari* for defects of form in establishing a highway, after it has been located, accepted and made.

THIS was a motion for a *certiorari* to the sessions for this county, grounded on the informality of certain proceedings in that court relative to the location and establishment of a highway.

Upon the opening of the motion, it appeared that the way had been located, accepted and actually made.

The court said they would not sustain motions intended to procure proceedings to be quashed for a mere defect in form, after a way had been laid out and opened, and all parties had acquiesced in it: and they denied the motion.

Padelford and *Wood* for the motion.

Sproat contra.

EX PARTES JEREMIAH CUSHMAN.

Of costs on the denial of a motion for a *certiorari*.

THIS was a motion for a *certiorari* to a justice of the peace for this county, who had imposed a fine on a soldier of the militia for misbehaviour at a review or muster.

Upon the motion's being denied, *Thomas*, who had appeared in opposition to it, moved for costs.

By the court. Were we to grant costs in this case, the only mode to enforce their payment would be by attachment, upon which the party must be committed. And in such case

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he must lie in prison until payment, though utterly insolvent: the act for the relief of poor prisoners not extending to persons so committed. If the legislature would authorize us to issue execution for costs in all cases, we should award costs many times where we now refuse them for the above mentioned reason.

Motion denied.

Wood for the petitioner.

HANNAH HOLBROOK *versus* ROBERT FINNEY.

A. conveys land to his four sons in fee who by deed of the same date mortgage the same land to the father to secure the payment of a sum of money and also a maintenance for the father during his life: it was held that the two deeds were parts of the same contract, and that the seizin of the sons was not sufficient to entitle the widow of one of them to her dower in the land.

THIS was an action for dower in several parcels of land, which *Hannah Holbrook* demands on the seizin of her deceased husband *Ezra Finney* during the coverture.

The cause came before the court on a case stated by the parties, in which it is agreed that *John Finney*, the father of *Ezra* and of three other sons, was seized of the premises in fee, and on the 13th of March, 1786, by his deed of that date, in consideration of 400*l.* conveyed the premises with other parcels of land to his said four sons *in equal proportion* in fee simple, the demandant then being the wife of *Ezra:* that immediately and by a deed *of even date* with the deed from *John*, the four sons mortgaged the same lands to their father in fee, to secure to him the payment of the said sum of 400*l.* with interest, and also a maintenance during his life: that these deeds were duly acknowledged on the same day, and registered the day after: that in December in the same year *Ezra*, the husband of the demandant, died: that in 1787 the mortgagee foreclosed the mortgage, the conditions thereof have been broken: that in 1790, by virtue of the levying of an execution to satisfy a judgment recovered against *John Finney* the father by the present tenant, he became seized in fee of the premises described in the writ; and that the execution of the said deeds was in pursuance of a previous agreement to the same effect made between the parties.

Upon these facts it was submitted to the court whether the demandant was entitled to recover her dower.

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The cause was shortly spoken to at this term by *Thomas* for the demandant, and *B. Whitman* for the tenant, and was then continued *nisi* for advisement. At the succeeding term at *Boston*, March, 1809, the opinion of the court was delivered by

PARSONS, C. J. [After reciting the substance of the case as agreed by the parties.] The question before the court upon these facts, is whether *Ezra Finney* the husband was, during the coverture, so seized of the premises, that the demandant has a right to her dower. He was not so seized, unless from the operation of the deed from his father to himself and his three brothers.

The tenant has made two objections. 1. That this conveyance was of an estate to joint tenants, of which the demandant's husband was not the survivor. 2. That her husband had that instantaneous seizin only, which will not entitle her to dower.

It is settled that if an estate be devised to two or more *equally to be divided*, they are tenants in common. The same construction is applied to a devise to two or more *share and share alike*(1). Also the words *equally to be divided* in a covenant to stand seized, or in the surrender of a copyhold, or in a deed appointing uses, create a tenancy in common(2). This construction has been adopted, because the words *in equal shares*, or *equally to be divided*, import a division *in futuro*.

The words in this deed are *in equal proportion:* and it is said that they do not imply a future division, but are applied only to the respective interests in the thing conveyed. On this ground they must be considered as wholly inoperative; for without them, the grantees would have taken an equal interest in the lands granted. To give them operation, may they not be considered as equivalent to the words *in equal purparties or shares*, and thus contemplate a future partition?

But it is not necessary now to decide this point, for by the statute of 1785, c. 61. passed three days after the execution of these deeds, it is enacted that all estates which had been,

(1) *Show. Parl. Cases*, 210.
(2) 2 *Vent.* 365, 6.—1 *Salk.* 391.—1 *Wils.* 341, 2.

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or which should be aliened to two or more persons, shall be deemed to be tenancies in common, unless it be manifestly the intent of the alienor that they should be held as joint estates: with a saving to the survivor of any estate in jointenancy before created and already vested in him. This statute has a retrospective effect, and comprehends this conveyance; and there seems to be no constitutional objection to the power of the legislature to alter a tenure, by substituting another tenure more beneficial to all the tenants.

If this objection had been pressed, it would have been unnecessary to consider it, as the statute of 1783, c. 52. in force when the deeds were executed, although repealed by the last cited statute, had abolished the principle of survivorship among jointenants, and had enacted, that on the death of a jointenant, the joint estate, of which he was seized, should descend to his heirs. In consequence of these provisions, the wife of a jointenant is dowable, as on the death of her husband there could be no survivor, who would be in by a title paramount to her claim of dower.

The demandant must therefore recover, unless the second objection should prevail. It certainly is law that where the husband is seized but for an instant, of this seizin his wife shall not be endowed. The seizin for an instant is where the husband by the same act, or by the same conveyance, by which he acquires the seizin, parts with it. Thus if tenant for life make a feoffment in fee his wife shall not be endowed for by making the same feoffment which passed the fee, he acquired a fee(3). And if a jointenant make a feoffment his wife shall not be endowed, for by the feoffment he was seized of a several estate but for an instant, which he acquired and parted with by the feoffment(4). So if a feoffment be to B. and his heirs to the use of C. and his heirs, the wife of B. shall not be endowed, for he was but an instrument; and the same feoffment, which gave him the seizin, by the statute of uses transferred it to C. Nor shall the wife of the conusee of a fine be endowed, when by the same fine the estate is rendered back to the conusor(5).

(3) 2 *Cro.* 615.
(4) *Ibid.*
(5) 2 *Co.* 77. *a.*

Let us now compare the present conveyances with these principles; for the previous agreement may be laid out of the case. If the deeds pursue it, it is useless; and if they do not, we must be governed wholly by the construction of the deeds. The mortgage back to the father, from the terms of it, is of even date with the conveyance from him. They are therefore to be considered as parts of the same contract, and as taking effect at the same instant. The conveyance from the father took effect when he delivered his deed: the mortgage back took effect when the mortgage deed was delivered: but both being of even date were delivered at the same time. The mortgagors were therefore seized but for an instant, taking an absolute estate in fee, and instantaneously rendering back a conditional estate in fee. These two instruments must therefore be considered as parts of one and the same contract between the parties; in the same manner as a deed of defeazance forms with the deed to be defeated but one contract, although engrossed on several sheets: and no interval of time intervened between the taking, and the rendering back of the fee.

But if the husband had continued seized for any portion of time, however short, his wife would have been entitled to dower; as if the conveyance back had been made posterior in point of time, or by a deed distinct from the first grant. There is the case of *Nash* vs. *Preston* reported in *Cro. Car.* 190. illustrating and supporting these principles. In that case J. S. seized in fee bargains and sells the land to the husband for 120*l.* in consideration that the bargainee shall redemise it to the bargainor and his wife for twenty years, rendering a nominal rent, with a condition that if the bargainor at the end of twenty years paid back the 120*l.* the bargain and sale should be void. The bargainee accordingly redemised it and dies. His wife shall have dower because the land by the bargain and sale was vested in the husband. But it would have been otherwise if the land was in, and was out of the husband by one act. In the case at bar, the execution of the two deeds, they being of even date, was done at the same instant, and constitutes but one act.

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The demandant therefore cannot support her claim, as her husband was never so seized as to entitle her to dower. According to the terms of the agreement submitting the case to the court, the demandant must become nonsuit.

HENRY THAXTER *versus* SOLOMON JONES & OTHERS.

The legislature may, consistently with the third article of the declaration of rights, and with the statute of 1799, c. 87. set off a member of any religious incorporation to another religious incorporation, whether of the same, or of a different denomination.

TRESPASS for taking and converting a cow of the plaintiff's.

In the case made for the opinion of the court at the last May term the following facts were agreed by the parties, *viz.* that the plaintiff has always resided within the limits of the north parish of *Hingham* in this county, which is a congregational society, of which the plaintiff was a member until the 11th day of March, 1806 : that upon that day he signified his desire, in writing to the clerk of the town of *Hingham*, to join the Episcopal Society, or *St. Andrew's* Church in *Scituate;* since which time he has paid all assessments made on him by said society, and has been elected for several years their representative in the convention of the episcopal church ; but has not attended public worship with the said society, nor elsewhere, but has paid the taxes annually assessed on him by the said society : that the defendants, being the legal assessors of the said north parish in *Hingham* for the year 1806, made a tax, pursuant to a vote of the parish for raising 900 dollars for the support of public worship, assessed the plaintiff his proportion thereof, and made a warrant for its collection, by virtue of which warrant the said cow was taken and sold by the collector of taxes ; and for this assessment the present action was brought.

The episcopal protestant society of St. Andrew's *church in* Scituate, was incorporated by the statute of 1796, c. 55. —By the first section a number of persons by name, together with the proprietors of *St. Andrew's* church in *Scituate*, residing in *Scituate*, *Hanover*, *Pembroke* and towns and places adjacent, are incorporated and vested with all such

powers, privileges and immunities as are enjoyed by incorporated congregational societies. By the second section it is enacted, that if any other person shall incline to join the said episcopal society, by signifying his desire in writing to the clerk of the town, to which he may belong, he with his poll and estate shall be considered as belonging to the said episcopal society as if he were incorporated by name in this act. And by a like proceeding any person belonging to the said episcopal society may be annexed to the congregational society in the town where he resides.

And now the cause standing for argument, *B. Whitman* of counsel for the defendants being called on by the court said, he should not deny that the plaintiff had brought himself within the words of the act of incorporation, but he should contend that the act ought to receive a construction compatible with the provisions of the constitution, and one which will be productive of less mischief than a literal construction would necessarily produce.

It is apparent that the true intent of the constitution relative to this subject is, to maintain public worship, and at the same time protect liberty of conscience. For these purposes it obliges every citizen to pay his share towards the support of the public protestant teachers of piety, religion and morality, and likewise provides that each citizen may cause his money to be paid to the teacher of his own sect, provided there be one on whom he attends. But by this act, construed literally every citizen may, by a simple expression of his desire, transform himself into an episcopalian, take from the teacher of the parish where he lives his support, and tranfer it to the minister of *St. Andrew's* church without once attending to his instructions, or joining in the public worship with the church.

It is not contended in the defence of this action that the legislature have not authority to create poll parishes as they are here called, or to incorporate proprietors of meeting houses, with powers to raise money for the support of public worship. But it is contended that the legislature cannot authorize a citizen to discharge himself from a contract

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which he has made as a member of one parish or society, by transferring himself to another, unless it be a case of conscience.

If this act is to be construed as the plaintiff would contend, it is directly opposed to the sixth article in the declaration of rights, inasmuch as it gives to this corporation particular and exclusive privileges distinct from those of the community, plainly not arising from the consideration of services rendered to the public.

The provisions of this act of incorporation, unless restrained by a beneficial construction, are also inconsistent with the statute of 1799, c. 87. which being a general law, and passed posterior to the act of incorporation, must control the prior act, and even repeal it, so far as the provisions of the two are incompatible. But as to all the facts in this case, they took place since the passing of the general statute, and the plaintiff was bound to conform to it.

The opinion of the court was afterwards delivered to the following effect by

PARSONS, C. J. [After stating the facts agreed, and reciting the provisions of the act of incorporation referred to.] It is admitted by the counsel for the defendants, that the plaintiff has brought himself within the letter of the act, so as to be a member of the episcopal society *in Scituate*; but it has been ingeniously argued that the statute ought not to be construed according to the letter but according to the spirit and true intent of it, so as to be consistent with the declaration of rights, and particularly the third article.

If this act is repugnant to any part of the constitution, it is without doubt void. The intent of the third article seems to be misunderstood. The great object of it was to enjoin on the legislature the causing public protestant teachers to be elected and maintained by the several incorporated religious societies in the state and to guard against an ecclesiastical hierarchy, and a religious test, by prohibiting a subordination of one denomination of christians to another. But it was not the intent, neither is it the language of that article, to prevent the legislature from making new religious incorporations, or from setting off the members of any religious incorporation to another religious incorporation, whether composed of the

same, or of a different denomination of christians. And it is very common for the legislature, in creating a new religious incorporation to give liberty to any of the members of it to recede from it, or to permit others in the neighbourhood to join it, they manifesting their election by some act of public notoriety, so that the right of assessing corporate taxes may be ascertained and well known.

Another clause in the third article has been urged, which authorizes any person to direct that the money paid by him for the support of public religious worship, shall be paid to the public teacher of his own religious sect, if there be any on whose instructions he attends. Hence it has been argued that the legislature are legally incompetent to set off any member of a religious corporation and annex him to another, unless the two corporations be composed of two different denominations of protestant christians, and the member be set off conscientiously of the same denomination with the society to which he is annexed.

But the third article ought not to have this narrow construction. Men of liberal minds may with a good conscience attend indifferently the public worship of different denominations, and may elect their denomination from mere local convenience, or from other good causes. Thus in the case of *Montague* vs. *The first parish in Dedham* [*ante* 269.] in which it appeared that several congregationalists, because they could not obtain accommodations for themselves and their families in the congregational meeting house, had joined the episcopal church in that town, it was holden that having with good faith, and not merely colourably, joined the episcopal church, and claimed to be, and acted as members of it, they were entitled to have their ministerial taxes paid to Mr. *Montague*, their own minister. And all which this clause in the third article requires is, that the public teacher be of his denomination.

But it is unnecessary further to consider this clause, for it is not relevant to the case at bar; it applying only to the case where a member of one religious society chuses to have his taxes paid to the public teacher of another, of which he is not a member. And it cannot be construed to limit the

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power of the legislature so frequently exercised of setting off a member of one religious society to another, even when both the societies are of the same denomination.

The inconvenience resulting from the power given to the members of several religious corporations of changing their corporate relations at their pleasure has been argued.

If the construction of this statute was doubtful,we ought to examine into the inconveniences that might result from any construction, so as to give the construction attended with the least inconvenience. But the language of the statute in this case is explicit, and no doubt can arise in its construction.—If there are any inconveniences, they result from the positive provisions of the legislature. We are therefore not to presume that mischiefs can arise from the discretion of the legislature upon a subject within its power. If any unforeseen mischiefs should arise, it is with the legislature to remove them; and not with us to alter the law.

It has also been argued that the subsequent statute of 1799, c. 57. providing for public religious worship has altered this act because this last statute enjoins on all corporate religious societies to support their public teachers; and a society may be disabled to raise this support, if the legislature can annex any number of its members to another religious society.

This last statute cannot, in our opinion, have the construction contended for. It is not within its intention or purview to affect the right of the legislature to create or alter corporations created for the support of religious worship, or to repeal any provisions before made on that subject.

Upon the whole we are satisfied that the plaintiff is a member of the episcopal society in *Scituate*, and not taxable by the assessors of the north parish in *Hingham*.

Let judgment be entered for the plaintiff.

Thomas and *K. Whitman* for the plaintiff.

A CASE

DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF BARNSTABLE,

OCTOBER TERM, 1808.

AT BARNSTABLE.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, HON. ISAAC PARKER, } JUSTICES.

EDWARD LORING *versus* SARAH BACON.

ASSUMPSIT for labour and materials employed in repairing the defendant's house, and for money laid out and expended. The cause was submitted to the opinion of the court, without argument, upon an agreed statement of facts, the material parts of which are recited in the following opinion of the court as delivered by

A. owns a room on the lower floor of a dwelling house, and the cellar under it, and B. owns the chamber over the room and the remainder of the house: the roof becoming ruinous, B. makes the necessary repairs: held that A. is not liable to contribute to such repairs.

PARSONS, C. J. The plaintiff declares in case upon several promises. The first count is *indebitatus assumpsit* in the sum of eighty dollars, according to the account annexed to the writ, the items of which are for timber, boards, shingles, nails and labour, and victualling the workmen. The second count is a *quantum meruit* for the same items, technically supposed to be different but similar. The third count is a general *indebitatus assumpsit* for eighty dollars laid out and expended.

The facts being agreed by the parties, the question of law comes before the court on a case stated. From this case it appears, that the defendant is seized in fee simple of a room

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on the lower floor of a dwelling house and of the cellar under it; and that the plaintiff is seized in fee of a chamber over it, and of the remainder of the house: that the roof of the house was so out of repair that unless repaired no part of the house could be comfortably occupied: that the defendant, though seasonably requested by the plaintiff, refused to join with him in repairing it; and the plaintiff then made the necessary repairs, and has brought this action to recover damages for her refusal to join in the repairs. It is also agreed that the parties had from time to time repaired their respective parts of the house at their several expense. And the question submitted to the court is, whether the plaintiff can recover in this action.

This is an action of the first impression. No express promise is admitted; but if there is a legal obligation on the defendant to contribute to these repairs, the law will imply a promise.

We have no statute, nor any usage upon this subject, and must apply to the common law to guide us.

Although in the case the parties consider themselves as severally seized of different parts of one dwelling house, yet in legal contemplation each of the parties has a distinct dwelling house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling house of the defendant: the chamber, roof, and other parts of the edifice are the plaintiff's dwelling house. And in this action it appears that having repaired his own house, he calls upon her to contribute to the expense, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage, if he had not repaired.

Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff.

Houses for the habitation, and mills for the support of man are of high consideration at common law; and when holden in common or jointenancy, remedies are provided against those tenants, who refuse to join in necessary reparation, by the writ *de reparatione facienda* (1) In *Co. Lit.* 56. *b.* it

(1) *Co. Lit.* 200 *b. Fitz.* 295.

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is said, that if a man has a house so near to the house of his neighbour, and he suffers it to be so ruinous that it is like to fall on his neighbour's house, he may have a writ *de domo reparandâ*, and compel him to repair his house. In *Keilway* 98. *b. pl.* 4. there is a case reported, in the time of *Henry* the eighth, in which *Fineux* and *Brudenell*, justices of the king's bench, were of opinion that if a man have a house underneath, and another have a house over it, as is the case in *London*, the owner of the first house may compel the other to cover his house, to preserve the timbers of the house underneath: and so may the owner of the house above compel the other to repair the timbers of his house below: and this by action of the case. But some of the bar were of opinion, that the owner of the house underneath might suffer it to fall; yet all agreed that he could not pull it down to destroy the house above. And in *Fitz. N. B.* 296. there is a writ of this kind. But in the case of *Tenant* vs. *Goldwin*, 6 *Mod.* 314. lord *Holt* was of opinion that this writ was by virtue of a particular custom, and not of the common law; and he doubted the case in *Keilway*.

But there is unquestionably a writ at common law *de domo reparandâ*, the form of which we have in *Fitz. N. B.* 295. in which *A.* is commanded to repair a certain house of his in *N.* which is in danger of falling, to the nuisance of the freehold of *B.* in the same town, and which *A.* ought, and hath been used to repair, &c. This writ, *Fitzherbert* says, lies, when a man, who has a house adjoining to the house of his neighbour, suffers his house to lie in decay, to the annoyance of his neighbour's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until he do it. But it is otherwise in an action of the case; for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoin to another on one side, or above, or underneath it.

But if the case in *Keilway* is law, the plaintiff cannot recover, for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her in dam-

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ages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

If the case in *Keilway* is not law, then upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expenses in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house.

In every view of this case, there is no legal ground, on which the plaintiff's action can be supported. We do not now decide on the authority due to the case in *Keilway;* but if an action on the case should come before us founded on that report, it will deserve a further and full consideration. The plaintiff must be called.

Bidwell, attorney general, for the plaintiff.

Sproat for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF MIDDLESEX.

NOVEMBER TERM, 1808.

AT CAMBRIDGE.

PRESENT.

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK,
HON. SAMUEL SEWALL,
HON. ISAAC PARKER,
} JUSTICES.

SAMUEL JUDD, PETITIONER FOR A REVIEW.

versus

GEORGE BUCHANAN.

Of granting a review.

THE affidavit of the petitioner stated only that he *intended* to have made a defence in the former action, and that he was defaulted by accident: but did not contain any denial that he owed the amount of the judgment recovered.

The respondent did not appear.

The court perceiving that the declaration in the original action was very defective, and the demand of such a nature that the defendant would not probably suffer judgment to go by default, said that although the affidavit was very imperfect, the review ought to be granted upon terms: and it was accordingly granted, the respondent to have leave to amend his declaration, and the costs of the review to be subject to the discretion of the court, according to the merits as they should hereafter appear.

Heald for the petioner.

COMMONWEALTH *versus* JOEL BROWN.

If one, to whom a waggon load of goods, consisting of several packages, is delivered to be transported from one place to another, fraudulently take away one of the packages, such taking is larceny.

THE defendant was indicted of larceny in stealing two pieces of cloth alleged to be the property of one *Willis*.

Upon the trial before *Sedgwick J.* at the last April term of the court in this county, it appeared that the goods charged to have been stolen were the property of Messrs. *Bridge;* that they, with other goods constituting a waggon load, were delivered by the owners to *Willis*, a common carrier, to be transported from *Boston* to *Sudbury;* that *Willis*, in driving his team met with an hurt on the road, which disabled him to proceed further, and he employed the defendant to drive the load to *Sudbury*, which he accordingly did; that the goods mentioned in the indictment were contained in a package, and placed at the bottom of the waggon between a cask containing spiritous liquor and another package; that all the load was safely driven and delivered at *Sudbury*, except the package, containing those goods, which package, without breaking it, was taken by the defendant.

The direction of the judge to the jury was, that if they believed the goods were taken by the defendant fraudulently, either before or after the load was delivered at *Sudbury*, the taking was theft.

The jury returned a verdict against the defendant, who thereupon moved for a new trial as for the misdirection of the judge, and the cause was continued to this term for the decision of the court upon that motion.

Bigelow, of counsel for the prisoner, cited 2 *East's C. L.* 695. 6. 7. in which the opinion in *Kelynge* 24. is controverted. He also read 1 *Hawk. P. C. c.* 33. § 3. and 5. and contended that when goods come to the possession of a person by the delivery of the owner, the embezzlement of an entire package is not larceny, although it is otherwise where a package is opened, and a part of its contents taken out with intent to steal.

Upon the *chief justice's* desiring *Bigelow* to consider the difference between taking one of several packages, and breaking up one package and taking away a part: *Bigelow* said he

could not contend that there was any difference between the two acts considered in a moral view. But technically considered (at least in the case of a carrier) the crime consisted in breaking the package, and having the possession in a different plight and manner from those in which they were at the time of the delivery. For in this case, as *Hawkins* observes, the possession of the part taken out of the package is not only gained by wrong, but is obtained basely and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one if discovered.

Bidwell, attorney general. This motion is not an application to the discretion of the court founded on any circumstances favourable to the defendant, but claimed as a matter of right arising out of a rule of law purely technical, which the defendant's counsel supposes to have been mistated by the judge. As there is no equity in his case, he must bring himself strictly within the rule, of which he claims the benefit.

The distinction contended for appears to be merely artificial. *East* and some other modern writers on crown law argue that the reason of it is not very obvious. *Kelynge* indeed understood the principle to extend no further than this, that the breaking of the package is a circumstance, from which it may be inferred that the possession was originally obtained by the bailee fraudulently, and therefore is void *ab initio*, upon the ground that, notwithstanding an actual delivery acquired by fraud, the legal possession still remains in the owner. But *Hale* and other authorities in general have gone farther, and they hold that by the breaking of the package, and separation of the goods they are put into a state different from that in which they were bailed, and that thereupon, without regard to the intent, with which the possession was first obtained, such an alteration of their condition, effected by the bailee, without the consent of the owner, terminates the bailment, as to any protection of the bailee from the consequences of an embezzlement. Accordingly his taking them in that state, for the purpose of converting them to his own use, is a felonious taking within the definition of larceny.

But a bailment is essentially different from a mere *charge*, such as a servant has of his master's goods, for an embezzle-

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ment by the servant in such case is larceny(1), notwithstanding his charge of the goods. In the case at bar, *Willis* was the bailee, and the defendant was merely his servant requested by him to drive the waggon to *Sudbury*. He drove the load as requested, but fraudulently took out of it this package of cloth, which had been placed between two other parcels.

Willis received the goods in the character of a common carrier, subject to the responsibilities, and entitled to the privileges of such a bailment. *Brown* was merely his driver or servant whose custody of the goods was not a bailment, but a mere charge; and his taking of them was therefore felonious.

But if he is to be considered in the character of a bailee of the goods, they were delivered to him as one entire mass, already packed and formed into a load, to be driven in that form; and not as several parcels, to be transported in such manner and by such means as he should choose. He had no possession of them but as a load. Within the principle of the law, the load was the entire package; and by separating this package of cloth, and taking it out of the load, he broke the package, and so changed the state and condition of the goods, that the bailment, if there were any, was thereby terminated, as to the privilege of the bailee; and his taking of the cloth under those circumstances was felonious in the sense of the indictment.

Ward in reply. It is not necessary that the defendant should be a driver of a public stage or waggon, in order to make him a common carrier. [*Parsons, C. J.* But it is necessary that he should carry for hire. Did the defendant carry these goods for hire, or would he have been answerable for them, if they had been stolen?] He might maintain an action for driving the team, and would have been liable to answer for the goods.

As to the difference between breaking a package, and taking an entire one, the law certainly makes the distinction, whether the reason of it can now be found or not. *Hawkins* however gives a reason, *viz.* that taking a part is to get possession clandestinely and without discovery; and the posses-

(1) 2 *East's C. L.* 666. 682.

sion is different from that intended by the owner. The examples he gives of breaking packages by a miller, carrier, weaver, &c. are very analogous to the present case. And in the case of corn in bags, the detection would be more difficult, it being all the same article.

The court [*absente Sewall, J.*] afterwards delivered their opinions *seriatim*.

PARKER, J. The motion for a new trial is founded on a supposition that the offence committed does not amount to larceny, because the defendant was employed to carry the goods, and instead of breaking a package, and taking out a part, which it is admitted would have been larceny, he took the whole package. And it has been argued by his counsel that, according to the *English* decisions, it does not amount to a larceny, because there was no original felonious taking. This seems a very subtle distinction, which makes the fraudulent taking of the whole a less crime than the taking of a part. The only reason for the distinction, perhaps, is that the original taking is not considered felonious; for there is certainly no moral difference.

I am of opinion that, although no particular package was broken, the taking one of several parcels or bundles is a severance of the property committed to his custody, without the consent of the owner. The defendant was not a common carrier. He committed the act clandestinely and fraudulently, and his intent must have been felonious. I think he cannot set up this nice distinction, to protect himself from the consequences of a very criminal act; and that a new trial ought not to be granted.

SEDGWICK, J. This case presents to our consideration two questions. 1. Were the goods, a part of which are charged in the indictment to have been stolen by the defendant, so delivered to him, that he is, in relation to them, to be considered in the character of a *carrier*, or ought he to be considered, in that relation, as merely the servant of *Willis?*

2. Supposing the defendant is to be considered as a *carrier*, and supposing also that the goods were *fraudulently* taken by him, before the load was delivered at *Bridge's*, was such taking theft?

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As to the *first* of these questions, it is not perhaps very important to enter into a discussion of, or to decide it. At the trial, I inclined very strongly to the opinion that *Brown* was to be considered merely as a *servant*, and not as a *carrier*. And I will now only add that, from the arguments at the bar, I have not perceived any sufficient reason for inclining to a different opinion.

As to the *second* question above stated, the principle of law, that *if goods delivered to a carrier, to be transported to a certain place, are by him converted to his own use* animo furandi *before they arrive at the place of destination, such conversion is not theft*,(2) has been too long established, and is too well known and settled, to be called in question. I admit that it must be now holden to be law, although to my apprehension it is a conclusion resulting from artificial reasoning merely: for such a conversion is as much an invasion of the right of property, and of greater moral turpitude, that if the original possession had been obtained without the consent of the owner. It is more flagitious, because it is accompanied by a violation of confidence. Every indictment for larceny, however, must charge a felonious taking, which includes a trespass; and therefore it is said, if there be no trespass in taking, as there is not where goods are delivered by an owner to a carrier, there can be no felony in carrying them away: yet those who have the possession of goods by the delivery of the owner, may be guilty of felony by taking away part thereof with intent to steal it(3). This separation of a part is considered as such a determination of the privity of contract, as to constitute it a felonious taking(4).

Now I can conceive no good reason why such taking a part should be considered as a larceny, while taking the whole, with the same wicked intention, should have a different construction. Such however I am bound to consider as a well founded distinction, and the defendant is entitled to the benefit of it, if the facts warrant its application in his favour.

(2) 1 *H. H. P. C.* 504, 505, 506.—1 *Hawk. P. C. c.* 33. § 3.—2 *East's C. L.* 696, 697, 698.
(3) 1 *Hawk. P. C. c.* 33. § 5.
(4) 2 *East's C. L.* 698.

It is true that *Hawkins* illustrates the rule, that those, who have the possession of goods by the delivery of the owner, may be guilty of felony by taking away a part thereof with intent to steal it, by the instances of a carrier's opening a package and taking out part of its contents ; a weaver who has silk to work ; or a miller who has corn to grind, taking out part thereof with an intent to steal it : instances of a separation, it is said of *a part* from an *united* mass of property. Hence it is attempted to be concluded, that if several masses or packages are so delivered, and the whole of one of them taken, with the same intent, it is not theft. But there is nothing in the nature of the thing, or in the words, by which the principle is expressed by *Hawkins*, on which to ground such a distinction. For surely taking an entire package, being one of several, is at least as heinous an offence, as injurious to the owner, and as much a determination of the privity of contract, as taking part of the same package would have been. And *East*, after a full consideration of this subject, concludes that in the case of a carrier the crime consists in a separation of part of the goods delivered from the rest, with a felonious intent, though no package be broken.

So far then we are bound to go upon authority ; and here, I think we must stop. Was *Brown* then to be considered as a carrier, does his case come within the rule ? The goods, which were delivered to him by *Willis*, composed a cart-load, consisting of a cask of spiritous liquor, and several packages of dry goods. The goods taken were in one entire package, placed in the middle of the load, and by him fraudulently taken and separated from the rest; and whether before or after the delivery of the other goods to Mess. *Bridge*, in whom the general property of them was, was not in evidence : nor is that circumstance in my opinion material. Whether before or after, the conviction I think was right (5).

PARSONS, C. J. The counsel for the defendant move for a new trial ; and they have argued that he was a carrier, having the lawful possession of the goods until the load was de-

(5) *Kel.* 35. 81. 82.

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livered at *Sudbury*, and that if he took the goods on the rout, it was an unlawful conversion and not a felony, because he did not open the package, and take part of the goods, but took the whole package.

Upon considering this case, I am of opinion, admitting the defendant to have been a common carrier, and thus to have had the lawful possession of the goods; yet all the goods in the waggon were delivered to him as one mass or body, and his taking away one of the packages, was a separating a part from the whole, and thus was determined the supposed privity of contract. For the contract with him was not to carry the several packages of which the load was composed, but to carry the load to *Sudbury* in the state in which it was delivered to him.

I have thus far considered the defendant as a common carrier, having a special property in, or a lawful possession of the waggon load. But the defendant was not a common carrier: he was a mere servant to *Willis* the carrier, to drive his team to *Sudbury*. Aud it would be extremely mischievous to have it understood that every driver of a team, employed by a common carrier, has a special property in the load, so that if he drives elsewhere than he was engaged to drive, and takes the whole load, he will be chargeable for an unlawful conversion only, and not for a felony. A new trial cannot be granted.

REBEKAH REEMIE, LIBELLANT, *versus* JOHN MARCUS REEMIE.

Proof of a second marriage without evidence of cohabitation is not of itself sufficient to maintain a libel for a divorce.

UPON a libel for a divorce from the bonds of matrimony, for the adultery of the husband, the libellant proved the respondent's marriage with her, and then produced and read a certificate of a second marriage, of the respondent with another woman, and relied on the presumption of cohabitation.

But by the court. This is not sufficient. It is still necessary to prove cohabitation, or actual criminal intercourse.

The libellant afterwards gave evidence of actual cohabitation; and a divorce was decreed.

Ward, for the libellant.

ANDREW CRAIGE *versus* JOHN MELLEN & AL.

Practice. The court will not always grant a continuance for special pleading.

TRESPASS *quare clausum fregit.* The defendant's counsel moved for a continuance of the action, for the purpose of pleading specially; apprehending that it was a standing rule of the court to grant a continuance of course for that purpose.

Curia. There has been such a rule: but it is not the rule now. The court will not grant a continuance for the purpose of special pleading, without enquiring what the intended pleas are, so as to ascertain whether time is requisite. Many special pleas require no more time than the general issue.

ELIZABETH FRENCH, LIBELLANT,

versus

ABRAHAM FRENCH.

Unprovoked force and violence used towards a wife are sufficient evidence of extreme cruelty, to maintain a libel for a divorce *a mensa et thoro.*

Where upon a divorce *a mensa et thoro*, alimony is decreed, and made payable quarterly, the court will not issue execution, without first making a rule on the husband to shew cause.

THIS was a libel for a divorce from bed and board *propter sævitiam*, with a prayer for alimony, the libel containing besides the charge of cruelty, an allegation of the probable value of the husband's property.

The court observed that it was regular for the respondent to plead, and to deny the cruelty, and also the amount of the property alleged.

The respondent pleaded "that the prayer of the said "*Elizabeth* ought not to be granted, because he says that "all and singular the allegations contained in the libel afore-"said are wholly false and untrue."

The libellant proved some instances of personal violence and severity which appeared to have been wholly unprovoked. The respondent attempted by way of excuse, to prove that he was occasionally subject to mental derangement.

By the court. There must be extreme cruelty, without the fault of the wife, to authorize the court to liberate her from the controul of her husband. But when force and violence

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are once used without provocation, the woman is unsafe. Such an husband ought not to have power over his wife. The excuse is not made out.

A divorce was decreed with an allowance of alimony payable quarter-yearly, the first quarter to commence on the day of decreeing the divorce.

The counsel for the libellant enquired whether execution should issue for the amount of the instalments, as they should fall due, if not paid.

The court made an order that execution issue, as the instalments become due, in any county where the court may be.*

Ward for the libellant.

Bigelow and *Jos. Locke*, for the respondent.

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* *Note.* At an adjournment of March term in *Suffolk* holden in July, *Ward* produced the affidavit of *Elizabeth French*, alleging that a quarter had sometime since expired, and that the instalment then due was not paid, and moved the court to issue an execution in her favour for the amount due, and he relied on the order passed at the time the divorce was decreed.

The court doubted their power under the statute to issue execution in this case without notice to the respondent, and at *Ward's* motion a rule was made, returnable at the next term in *Middlesex*, for the said *James French* to shew cause why execution should not issue against him for the sum in arrear, and also why an attachment for a contempt should not be awarded against him.

JERATHMEEL CLAP & AL. *versus* ARCHIBALD M'NEIL.

If one grant land as bounded on a thirty feet street, with a privilege of passing in said thirty feet street; and at the time of the grant, the grantor had a building on other land of his which projected ten feet into the street, no action lies for the grantee for the continuance of such obstruction.

TRESPASS on the case, in which the plaintiffs, claiming the use of a certain thirty feet street, complain against the defendant for obstructing a part of it by continuing a certain shed upon it.

The cause came before the court on a case stated by the parties at the last October term in this county, in which it appears that the defendant was seized of three several parcels of land contiguous to each other, on one of which was a ropewalk, adjoining on a second parcel which he opened as a way called a thirty feet street, but the same has never been established as a public way. On the side of thisway opposite to the ropewalk was the third parcel of land. Adjoining to the ropewalk and projecting from it ten feet over the said street was the shed or fixture complained of, being about twenty feet in length, and leaving the street for that space but twenty feet in width. The defendant sold and conveyed to the plaintiffs in fee simple the third parcel of land, bounding it on one side "*by said thirty feet street, with the privilege of passing in the said thirty feet street.*" Ever since and long before the said sale, the defendant has continued the said fixture to his ropewalk.

Upon these facts it was agreed, that if the court should be of opinion that the plaintiffs ought to recover, they should have judgment for nominal damages only, (no special damage having been suffered) with full costs; otherwise the defendant should have judgment for his costs.

Gorham for the plaintiffs. The defendant has granted to the plaintiffs a right of passing in a thirty feet street, which is of the same import as a street thirty feet wide throughout its whole length. [*Parsons, C. J.* If the street had been in fact at the date of the deed but twenty feet wide, could the plaintiffs compel *M'Neil* to make it wider? or if it had been more than thirty feet, would he have had a right to narrow it, or to incumber all but the thirty feet?] The grant in the deed is equivalent to a covenant to give a passage thirty feet wide; and the only difference between this grant and such a covenant is, that it gives a different remedy.

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Fay, jun. for the defendant. The intention of the parties is to be considered in construing every grant. The defendant meant only to give the plaintiffs a right of passage in a certain way which then existed. The name of the "*thirty feet street*" is only matter of description, and was never intended to define the quantity or limits of the way, in which the right of passage was granted. If it had been the intention of the parties that a street thirty feet wide throughout should be opened, the plaintiffs would have required an express covenant to that effect.

The opinion of the court was afterwards delivered by

PARSONS, C. J. The question submitted to us by the statement of facts agreed by the parties in this suit is, whether the plaintiffs can or cannot maintain their action? And it is our opinion that the action cannot be maintained.

It is agreed that the way remains now in the same state, in which it was when the title of the plaintiffs to it commenced, the defendant having done nothing to alter or abridge it. The plaintiffs therefore cannot complain, unless the defendant has stipulated, either to widen it, or to remove any obstructions then existing. In looking into the deed, we find no covenants of this kind; the plaintiffs' right to the way must depend wholly on the construction of that part of the deed describing the estate conveyed. Among the bounds of the land sold, there are these words, "*then turning and running southerly by land of said* M'Neil *seventy feet to a thirty feet street, then turning and running westerly by said thirty feet street fifty feet.*" By these words the plaintiffs cannot claim even a right of way in that street. But after the description of the close are added these words, "*with the privilege of passing in the said thirty feet street,*" These words give the plaintiffs a right of way in that street, as it was then opened as a way; but cannot have the effect of a covenant by the defendant that the fixture to the ropewalk should be removed, so that the street, called a thirty feet street, should be every where thirty feet in width, or as a grant of any way, but in that street as it was then opened and used. On this construction the defendant must have judgment.

WILLIAM CLEVELAND *versus* JACOB WELSH.

A plea to a transitory action, alleging that neither of the parties lives within the county where the action is brought, is a plea in abatement to the writ, and must be filed before the jury is impannelled, pursuant to the statute of 1782, c. 11. § 6.

THE defendant was attached in this suit by the name of "*Jacob Welsh*, of *Shirley*, in said county of *Middlesex*, gentleman; and the sheriff of this county made service of the writ by leaving a summons at his former dwelling in said *Shirley*. The plaintiff is named of *Salem* in the county af *Essex*.

At the return term of the common pleas, but not until after the jury was impannelled, the defendant offered to file the following plea, *viz*.

"And the said *Jacob Welsh* comes and prays judgment if the court here will take any further cognizance of this action, because he says that at the same time of suing out the plaintiff's writ, and for a long time before, the said plaintiff was an inhabitant of *Salem* in the county of *Essex*, as by the same writ is supposed; and that the said *Jacob Welsh*, during all the time aforesaid, was an inhabitant of *Boston*, in the county of *Suffolk*, and commorant there, and not an inhabitant of, or resident at *Shirley* in said county of *Middlesex*, as by the same writ is supposed: and the cognizance of the same writ belongs exclusively to one of the courts in said county of *Essex* or *Suffolk*, and not to this court. And all this the said *Jacob Welsh* is ready to verify. Wherefore he prays judgment, that the same writ may abate, and he be allowed his costs, agreeable to the statute in such case made and provided."

The court below refused to admit the plea, it not being filed before the jury was impannelled. The defendant then filed a good plea to the action, and on demurrer to it with reservation obtained judgment. The plaintiff appealed, and now the defendant moved the court here that he may be allowed to file his plea in abatement at this term, and that the plaintiff may be compelled to reply or demur to it, because the common pleas illegally refused to receive it.

It was agreed that the plaintiff at the time of suing out his writ was an inhabitant of *Salem*, and the defendant an inhabitant and a municipal officer of *Boston*. The summons was left at *Shirley*, and the defendant did not receive it until the

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opening of the common pleas, and he could not have arrived at the place of its sitting until after the jury was impannelled.

In this state of the action the questions submitted to the court as stated by the counsel for the defendant were, 1. Whether this plea to the jurisdiction is a plea in abatement within the statute of 1782, c. 11. § 6.—2. If it is, whether upon the verification of the above facts, the court below ought not to have admitted the plea to be filed, after the jury was empannelled.

For the defendant, it was contended, that a plea to the jurisdiction of the court was not a plea in abatement of the writ, but had a different commencement and conclusion (1). If the defendant was to be deprived of this exception, unless his plea was filed before the empannelling of the jury, it would put it in the power of the plaintiff to destroy the locality of the action, and entirely defeat the object of the statute, by avoiding to give personal notice.

The opinion of the court was delivered by

PARSONS, C. J. If the court of common pleas did wrong, and refused to receive a regular plea in abatement, when filed seasonably, we are satisfied that such plea ought to be received in this court, notwithstanding the defendant has pleaded to the action: for without further proceeding below, he could not have a judgment there entered, from which he might appeal, and at this court have the orders and decisions of the court below revised and corrected. The question therefore is, whether the common pleas did or did not right in refusing to receive this plea.

By the statute of 1782, c. 11. the common pleas for any county had jurisdiction of any civil action, of the value of *forty shillings*, arising or happening within their county, and triable by the common or statute law. Consequently it had cognizance of all transitory actions brought before it by writ sued out and returnable to that court: for such action necessarily arose within their county. And no power was given to the court to change the *venue* to the county where the *cause* of action happened.

(1) *Bac. Abr. Tit. Abatement.*

Cleveland *vs.* Welsh.

But to prevent vexation to defendants, in being wantonly sued in remote counties, the 13th section of the statute of 1784, c. 28. provides that transitory actions, when the plaintiff lives within the state, shall be sued in the county where either he or the defendant lives. And if such action be sued in another county, the writ shall be abated, and the defendant allowed his double costs. This remedy was given to the defendant. He may consequently wave it: and he must be considered as waiving it, unless he seek it by plea in abatement to the writ. For the exception is not to the jurisdiction of the court of common pleas, which has conusance of all transitory actions above the value prescribed in the statute (2); but is to the writ, as sued out and returned in a wrong county.

The plea in this case sufficiently brings the defendant within the said 13th section of the statute. But it is a plea in abatement to the writ: and by the 6th section of the first cited statute it is enacted that all pleas in abatement to the writ shall be made, signed and filed in the common pleas, before the jury is impannelled. But this plea was not filed before the jury was impannelled: and the common pleas did right in rejecting it. It cannot therefore be received in this court.

Ward for the plaintiff.

Dana and Heald for the defendant.

(2) By the statute of 1783, c. 42. § 8. the common pleas have not original jurisdiction in any civil action, when the damage demanded does not exceed *four pounds*, except actions wherein the title to real estate may be concerned.

THOMAS BUCKMINSTER & AL. APPELLANTS,

versus

ABEL PERRY.

Upon an appeal from a decree of the probate court approving a will, the will is to be proved in this court as if the question had originated here; and the appellee, having the affirmative, is to open and close.

THIS was an appeal from a decree of the judge of probate for this county proving, approving and allowing the last will and testament of *Abel Perry*, deceased.

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The question being on the sanity of the testator, and the court having directed an issue to the jury, the counsel for the appellants enquired of the court in what manner the question was to be brought before the court and jury, as it appeared that two forms had been heretofore used. (1)

The chief justice said the proper form was for the appellants to make their objection in the manner of a plea, to which the appellee was to reply. The will, he added, is to be proved *ab initio* on the trial, as if the question had originated here : and as the appellee was to have the affirmative side of the issue, he would open and close.

The appellants on the trial relied on the circumstance of the testator's not having disposed of all his real estate by his will ; and the testimony of two or three witnesses, who were of opinion that the testator was much broken, and very forgetful about the time the will was made : and they testified particularly to several slight instances of a want of recollection.

But all the subscribing witnesses, were very positive that, at the time, of executing the will, the testator was of sound mind.

PARSONS, C. J. in summing up the cause informed the jury that it was the opinion of the whole court, that the evidence given by the appellants to invalidate the will, deserved but little consideration: that the question was confined to the sanity of the testator at the time of making the will, which seemed to be fully established by those, whose duty it was to be satisfied of that fact, before they subscribed the instrument.

The jury found that the testator, at the time when, &c. was of sound mind ; and the will was accordingly proved, approved and allowed.

Ward and *Bigelow* for the appellants.
Dexter and *Sullivan* for the respondent.

(1) *Vide Phelps & al.* vs. *Hartwell & al.* 1 *Mass. Rep.* 71.—and *Blaney* vs. *Sargeant, Ibid.* 335.

JOHN TIPPETS

versus

EDWARD WALKER, AMOS WHITTEMORE AND WILLIAM WHITTEMORE, JUN.

When a committee appointed by the directors of a turnpike corporation covenant under their hands and seals to pay money to one who contracts to make part of the turnpike, they are personlaly liable on such covenant.

THIS action was *covenant broken*. Upon oyer prayed of the deed declared on, it appeared to be an agreement made between the defendants, a committee appointed by the direction of the *Middlesex Turnpike Corporation*, to contract for making the Turnpike road, or any part of it, on the one part, and the plaintiff on the other part. The plaintiff agrees with the said committee to make a part of the said turnpike there defined, and in the manner there described. And the said committee agree to make the several payments to their plaintiff there mentioned, while the work is in execution, and when the same is finished to the acceptance of the directors aforesaid, the committee are to make the remaining payments in such manner, and by such instalments as are there specified. In witness whereof the parties interchangeably set their hands and seals. And the names of the defendants are subscribed, and their seals affixed on the one part, and the plaintiff sets his name and seal on the other part.

The breach assigned was the failure of the defendants in making the payments stipulated to be made to the plaintiff on his finishing that part of the turnpike, which he had agreed to make.

Two issues were joined, which were tried before *the chief justice* at the sittings after the last November term in this county. The first was *non est factum*, which was found for the plaintiff. On the second issue the question was whether the plaintiff had finished the turnpike to the acceptance of the directors, which was also found for the plaintiff.

After the verdicts were returned, the defendants moved in arrest of judgment, on the ground that they are not personally answerable on the covenants in the said deed declared on because the same was made by them in behalf of the *Middlesex Turnpike Corporation*, and not for their own account, or with an intent to charge themselves in their own private

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capacity. The cause stood continued to this term for the decision of the said motion. And now

Dana, in support of the motion, argued that the defendants are to be considered as public agents, and as acting in a public capacity and not as individuals (1). The intention of the maker must determine the construction of a deed. If the defendants did not intend to bind themselves, it is not their deed: and if it is not the deed of the corporation, it is merely void (2).

Bigelow e contra cited and relied upon the case of *Appleton* vs. *Binks* (3), and the cases therein cited, as establishing the principle, that where one covenants under his own hand and seal for the act of another, he is personally bound by his covenant notwithstanding he describes himself in the deed as covenanting in the character of an agent, or for and in behalf of such other person. And he commented particularly on the concluding sentence of the deed, in which the defendants had described themselves as party to the agreement in the following words, "In witness whereof the aforesaid *parties* have hereunto set *their* hands and seals, &c."

The opinion of the court was delivered by

PARSONS, C. J. When a turnpike corporation is created, it has power to make a road over the land of others, paying the owners for the easement, or they may purchase the soil with the consent of the owners, which however is not frequently done. When the road is made, the corporation is entitled to demand and receive a toll of travellers for the use of it, in trust for the members of the corporation in proportion to their respective shares. The property of every member is a right to receive a proportional part of the toll, which is considered as personal estate, is alienable, and may be seized and sold on execution against him, as his private property.

The right of the corporation seems to be a franchise, a mere incorporeal hereditament; and as no provision is made in the

(1) 1 *Morgan's Essays*, 143.—10 *Co.* 92. 93.—*Macbeath* vs. *Haldimand.* 1 *Term R.* 172.—*Unwin* vs. *Wolseley*, *Ibid.* 674.—*Brown* vs. *Austin*, in error, 1 *Mass. Rep.* 208.

(2) *Bac. Abr. Tit. Leases and Terms for years.*—*Frontin* vs. *Small.* 1 *Str.* 705.—2 *L. Raym.* 1419—8 *Mod.* 116.—9 *Co.* 77.—2 *Caine's N. Y. Rep.* 66.—6 *Term R.* 176.—2 *East's Rep.* 142.—3 *Caine's Rep.* 69.—*Selwin's Nisi Prius*, 259. 260.—1 *Brown's Ch. Rep.* 101.—1 *Wash. Rep.* 199.

(3) 5 *East's Rep.* 148.

act creating it, by which it may be aliened, or taken in execution, it may hereafter perhaps require consideration, whether on a judgment against such a corporation this franchise can in any manner be taken in execution. But if it may, it will sometimes happen that the right to take toll is not of sufficient value to reimburse the expense of making the turnpike ; and the remedy the corporation possess of assessing the shares may be inadequate, their value on a sale not being equal to the amount of the assessments : and as the bodies or private property of the individual members cannot be taken in execution to satisfy a judgment against the corporation, it certainly is a prudent measure, in those who contract to do the labour to insist on the responsibility of individuals, and not trust to the corporation for payment. And if any individuals, who are agents for the corporation, or of any officers of it, will voluntarily stipulate with the workmen for their payment, it is certainly reasonable that they should be holden to their contract.

A case of this kind is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state in discharging all contracts made by its agents in its behalf, cannot in a court of law be drawn into question.

The decision of this cause must therefore depend upon the construction of the deed. If the defendants have by their deed personally undertaken to pay, they must be holden. To the agreement the defendants have not (if they had legal authority) put the seal of the directors, or the seal of the corporation ; but have put their own seals. It is therefore their deed ; and if it be not their covenant, it is not the covenant of any person or corporation ; and the apparent intent of the plaintiff to have his payments secured by a covenant will be defeated.

The defendants do not describe themselves as a committee of the corporation, but of the directors appointed to contract. The corporation are therefore not bound by this contract, unless it gave the directors, its immediate agents, a power to substitute agents under them, by whose contracts it should be bound. But this does not appear ; and we cannot presume it without some evidence. The directors are not

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a corporation, but the agents of one; and if answerable, are answerable for their personal contracts as private persons. The contract before us is a contract of some individual persons for others; and if they have bound themselves, they must look to their principals for indemnity.

But they have expressly bound themselves. The agreement is between the plaintiff and *Edward Walker* and the others, who are described as a committee, and this committee stipulate that they will make the payments agreed on to the plaintiff, in behalf, not of the corporation, but of the president and directors, who are officers and agents of it.

As they have covenanted to pay in behalf of others, and have not made the payments agreeably to their covenants, their own covenants have been broken; and they must be answerable to the plaintiff for the damages he has sustained by the breach of them, which the jury have assessed; and judgment must be entered on the verdict.

WARD N. BOYLSTON, ADMINISTRATOR,

versus

REUBEN CARVER.

Under the statute of 1788, c. 51. an executor or administrator to whom land is set off on execution, takes an estate in such land in trust for the heirs, &c. and neither the legal estate, nor the possession vests in the heirs until the land is apportioned and distributed in the probate office, or until the administration has been settled, or it is ascertained that the land will not be wanted to discharge debts, &c.: and the administration bond is security for the faithful administration of such land, it being only a substitute for money due to the testator or intestate: and the executor or administrator may maintain an action for the same land against a stranger in possession.

THIS was a writ of entry, and was tried upon the general issue before *Parker, J.* at the sittings fater the last October term in this county.

The report of the judge states that the demandant counted on his own seizin as administrator of the goods and estate of *Thomas Boylston*, late of the city of *London*, merchant deceased, to recover seizin of certain lands in *Weston* in this county which were a part of the real estate of which *Moses Gill*, late of *Princeton*, esquire, died seized, and which had been appraised and set off to the demandant in part satisfaction

of an execution issued upon a judgment recovered by him, in his said capacity of administrator, against the goods and estate of the said *Gill ;* the same land having been sold by the executor and residuary devisee of the said *Gill*, before the said judgment was recovered.

In support of his action the demandant offered in evidence, an authenticated copy of said judgment, execution and extent, and also certain deeds, documents and papers tending to prove an assignment of all the estate, rights and credits of the said *Thomas Boylston* in his lifetime, he being then a bankrupt, to his creditors ; and the appointment of certain trustees to manage and dispose of the same ; also certain other deeds and papers shewing, among other things, a transfer to the demandant of the debt due from the said *Moses Gill* to the said *Thomas Boylston*, upon which the said judgment was recovered. A copy of the last will and testament of the said *Thomas Boylston*, proved according to the statute of 1785, c. 12. was also offered by the demandant

The counsel for the tenant objected at the trial, that an administrator cannot maintain an action to recover seizin of lands, without shewing that such possession is necessary in order that the lands may be disposed of to pay the debts and legacies of the intestate, such necessity being alleged in the writ, but no evidence of it offered.

The parties being mutually desirous to have the question decided by the whole court, all the evidence offered by the demandant was rejected, and a verdict returned for the tenant, subject to the opinion of the court as to the competency of the demandant to maintain this action, under the special circumstances of this case appearing from the deeds, documents and papers offered in evidence as aforesaid.

The cause was continued to the present term, and was now argued by *Bigelow* and *Jackson* for the demandant, and *Ward* and *G. Blake* for the tenant.

Jackson. The demandant has a right as administrator to maintain this action, where he has levied an execution upon the real estate of the debtor of the deceased, and is afterwards wrongfully disseized. In every such writ of entry, the gist of the action is the *unlawful entry* of the tenant. The principle is the same in the other class of writs of entry,

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where the entry is not tortious, but made under a defective title : as in *dum fuit infra ætatem*, where the general or most common issue of course is, whether the demandant was of full age at the time of the demise(1). So in *dum fuit non compos* the issue is whether the ancestor was of sound mind at the time of the grant(2). The writ of *ad terminum qui præteriit* is another instance(3). The object in short of every writ of entry is to disprove the tenant's title by shewing the unlawful or defective commencement of it.

The material fact then in the present suit is the unlawful entry by *Carver*, and the ouster of the demandant. To prove his seizin he shews his execution and the levying of it upon the demanded premises, being part of the estate of which *Gill* the debtor died seized. This gave him the actual seizin and possession(4), and of course put *Carver* out of possession.— They could not both be seized at the same moment(5). The judgment creditor's being an administrator can make no difference ; for the expression in the statute is " when *any person* who shall obtain a judgment and execution," &c.

The statute of 1788, c. 51. enacts expressly that an administrator levying an execution in this manner shall be " seized and possessed" of the lands,&c. And in the case of *Gore* vs. *Brazier*(6), it was decided that such a levy by an administrator gave him the actual seizin and possession of the lands, and did of course put out the former possessor. If he was wrongfully ousted, the law has provided him several remedies. He might enter without process, or sue his writ of entry, or resort to his writ of right if he chose. In this case *Carver* preferred the first, and accordingly made his entry upon the land ; and the question now is, had he a right so to enter ?

The demandant having shewn his seizin by the levying of the execution, the *onus* is thrown on the tenant, to shew *his right*. For when the tenant entered upon the demandant's possession, he became an *actor*, and it can be no hardship

(1) *Rast. Ent.* 248. *b.*
(2) *Ibid.* 249.
(3) *Ibid.* 256.
(4) *Stat.* 1783, *c.* 57.
(5) *Langdon* vs. *Potter & al.* 3 *Mass. R.* 215.
(6) 3 *Mass. R.* 523.

upon him to be called upon to shew what right he had so to enter. But he does not even pretend such right, and his whole defence is that certain third persons, strangers to him, had that right.

It will not be pretended that the demandant had not, at a certain point of time, the actual and lawful seizin and possession of the premises. The two cases before cited, and the plain letter of the statutes establish this position. And if he was rightfully seized, it does not lie in the mouth of *Carver* to say that he entered *in alieno jure*. For if he was seized but for a moment only, that is sufficient against a stranger.

But it is not true that he was seized to the use of others, in the technical sense of the expression, so that the use was executed by the statute of uses, and the estate vested in others. Before the statute of 1788, c. 51. an administrator could levy on real estate; but it was generally held that by so doing he became himself the owner of the land, and he was held to account for the amount of the debt. It is true that statute provides that when land is so set off, the administrator shall be seized to the sole use and behoof of the widow, &c. By the word *use* the legislature must be understood to mean *trust;* and accordingly a chancery power is given to the probate court to compel the execution of that trust, which depends on future and contingent events. The words use and trust are not unfrequently used thus indiscriminately (7): and in construing statutes or conveyances the court will give them such interpretation as will effectuate the intention of the legislature or parties.

Other parts of the statute shew clearly that the legislature intended to give the administrator an actual, physical possession, and not a mere instantaneous seizin, which terminates the moment it commences. Thus by sect. 4. if the mortgagor, or judgment debtor shall redeem, the administrator, &c. shall receive the redemption money, and reconvey. And in such case the party redeeming will be entitled to an account of the rents and profits. But how is the administrator to account, unless he is seized? The third section enacts that

(7) *Gilbert on uses*, 194.

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the administrator, &c. shall be *seized and possessed*, &c. These words very strongly support our construction; and the case of *Gore* vs. *Brazier* proves that by them is meant an actual possession. The same section provides that the judge of probate may make distribution of this estate, when it is ascertained that it will not be necessary for the payment of debts, &c. But until this fact is ascertained, the administrator is "seized and possessed of the whole estate," in trust for those who shall be designated by the judge of probate.

The statute also enacts that the administrator, &c. "shall have full right, power and authority to dispose and make sale of the estate, if necessary for the payment of debts," &c. These expressions are quite sufficient, if the administrator holds the legal estate in trust for others. But if the legal estate were in others, stronger words would have been used. Thus in statute of 1783, c. 32. § 1. where an administrator is authorized to sell the real estate of the deceased, which had of course descended to the heirs, it is expressed that "he may make, sign and execute deeds and conveyanc- "es, &c. which shall make as good a title to the purchaser," &c. "as the intestate could have made."

It may be added that the preamble of the statute of 1788 recites that it is to remove doubts "with respect to the extent of the right, title and interest" of administrators in such cases. Whereas on the other construction the administrator has no estate, right or interest whatever: it is all transferred instantaneously to the *cestui que use*.

But if the other construction be the true one, and the demandant had a right to retain the possession but an instant; his continuing the possession without right is an injury only to the widow, &c. who might have a right to enter upon him. But *Carver* has no such right. It is believed to be an universal rule, that the tenant in possession, however imperfect his right may be, may always maintain that right, and hold the possession against a stranger.

The difficulty here as in the case of *Gore* vs. *Brazier*, seems to arise from a mistaken notion that the administrator was never seized: whereas the statute expressly says he shall

be seized and possessed. And in that case, if *Gore* had a right to re-enter and hold, the court never would have assessed his damages at the value of the land.

If it be said that the demandant has declared as administrator, and therefore his writ is wrong; the answer is that notwithstanding the writ is so, yet if he shews that he had any right, there can be no objection to the form under the general issue. The case in the year book 49 *Ed.* 3. 22. is an authority to that purpose. That was a *cui in vitâ*, the allegation of the demandant was, that she had the land by the gift of *A. B.* *Per cur.* It goes only to the writ, and she may shew a gift from *C. D.*

G. Blake, for the tenant, thought the cause lay in a very narrow compass, and must turn principally on the construction of our own statutes. It was therefore, he thought, unnecessary to notice the nice and ancient learning which the counsel for the demandant had introduced into his argument. The demandant seemed to proceed upon a strange mistake, that it is incumbent on the tenant to make out his right.

If this were a writ of entry in the *per*, the *per* and *cui*, or the *post*, and the tenant had pleaded the general issue *non disseisivit*, it would in that case be necessary for him to shew his title; because the plea of *nul disseizin* admits the entry of the tenant. But in all other cases the demandant must shew, not merely a possession, but a right of possession likewise. And it would be a new and extraordinary case, if the tenant were held to shew a rightful entry.

Three things are necessary to a complete title to real estate, *viz.* possession, a right to the possession, and a right of property. And the tenant in possession may retain that possession, until the demandant defeats the possessory title, by shewing a right of possession in himself. For against strangers possession alone is a sufficient title.

At the common law an executor or administrator has no more right than an alien to maintain an action for the recovery of real estate. He cannot dispose of the land, nor even make a distress upon it. And by our own statutes no authority is given to an executor or administrator to maintain an action real.

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It is admitted that an officer did go upon the demanded premises, and there deliver a technical possession of them to the demandant. But it is contended that, as he had no right to put *Carver* out, he was not by that act deprived of the possession. For a mere unauthorized technical delivery of the possession, which *Carver* may elect to consider as a bare trespass, cannot disturb his seizin, or transfer it to *Boylston*.

The question is, whether the mere taking possession under the execution does vest such a possession and *seizin* in the demandant, as to throw the burthen of proof on the tenant, and compel him to shew his title. If this be sufficient, the judgment creditor may shew the officer any land, to which the tenant in possession has not a perfect title, and call it the estate of his debtor, and in this way he would always be able to satisfy his judgment, whether his debtor ever had any property or not.

I am willing to consider the question to be as the counsel for the demandant has stated it, *viz.* whether *Carver* has disseized *Boylston*. For if *Boylston* ever had a seizin, I insist that it was only a seizin to certain uses pointed out by the statute, and could be but momentary; for the use is executed the instant the seizin to uses vests. It is therefore impossible that he should be disseized, because there is no time, in which a disseizin could be made.

It is not incumbent on an administrator to inventory real estate(8). And he has not even a right to enter upon it: nor has he more control over estate taken in execution, than any estate of which the deceased died seized(9). It appears then that an administrator, as such, has nothing to do with the real estate, any further than certain statutes give him authority over it for some specific purposes. And it would be very inconvenient to let the administrator go on and recover such estate without his giving bonds to account for it. The mischiefs are numerous and obvious.

Taking the preamble of the statute of 1783 together, the intention of the legislature is evident. The object of the statute was to define the powers of executors and administra-

(8) *Henshaw* vs. *Blood & al.* 1 *Mass. R.* 43.
(9) *Prescott* vs. *Tarbel, Ibid.* 204.

tors, and to give further powers. It also provides in what manner land mortgaged or levied upon, should be disposed of. The mortgage being a security for personal estate, the heir, as such, could have no right to the land mortgaged. But there is nothing in the statute, which gives an administrator a right to maintain a real action.

The word *use* in the statute must have its technical meaning. To give it another would be contradicting an established rule in construing statutes, that words used in former statutes, the meaning of which has been fixed and settled, shall, when used in a latter one, be understood in the same sense.

The object of the statute was to make the estate levied upon or taken by mortgage, a part of different fund from the rest of the real estate, and to prevent its going to the heir in the same way as the real estate, of which the testator or intestats died seized.

The provision of the statute, that an executor or administrator shall receive the money paid to redeem land mortgaged or levied upon, has been urged as shewing that the fee must rest in him at least until the time for redemption expires. Our statutes in making real estates liable for the payment of debts, have disturbed many common law principles. In this case the executor or administrator is made an agent or trustee for the heirs on one part, and for the debtor on the other ; but it never was intended by the legislature to vest the fee in him. For giving him power to receive the redemption money by no means gives him power to sell. Much less does it authorize him to institute real actions.

This case is very different from that of *Gore* vs. *Brazier*. There *Gore* voluntarily gave up the possession. But if he had chosen to retain it we deny the right of the creditor to turn him out. In the case of *Langdon* vs. *Potter & al*, the judgment creditor was not an administrator ; and it is therefore not applicable to the present case.

The demandant having instituted his action as administrator, it is not competent for him now to change his ground, and claim *in proprio jure*. It is absurd to say that the long history he has given of his right as administrator shall be re-

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jected as surplusage. An administrator cannot join a count in his own right in an action which he brings as administrator: and an obscure authority from the year books of a decision, at a time when pleadings were *vivâ voce*, will have little weight now, when they are more formal, and formed with deliberation and study.

Ward, on the same side, enforced the arguments urged by *Blake*, and said it was material to observe that neither the declaration, nor the report of the judge, states that there is any necessity to sell this estate for the payment of debts, &c. There is therefore no occasion for the administrator to possess himself of it. The estate of the deceased is committed to him, to be administered in the payment of debts; and the law authorizes him to intermeddle with it no further than it is necessary for that purpose.

It is a novel doctrine that it is immaterial how the demandant states his title. If it was well founded, the counsel for the demandant in this action, with his habits of research, would have produced some better authority in support of it than the ancient *dictum* he had cited. That *dictum*, so remote, so loose, and so much at variance with principle, can have but little weight.

Bigelow for the demandant in reply. If the demandant cannot recover in this case, here is a right without a remedy. For it is certain that no other person but he can recover this property. The administrator had an unquestionable right to levy his execution in the manner he has done. And it would seem very strange, if he had such right, that he has no right to maintain an action to recover the estate levied upon, and thus avail himself of the fruits of his levy.

As to the form of the count, the demandant's describing himself as administrator is immaterial. It is like the case of a plaintiff declaring upon a promissory note made to him as administrator: he may if he please describe himself as administrator, though he may also sue in his own right. The objection that there cannot be two counts, in different rights, in the same writ, will be of no weight in this case; because, as there can be but one count in a real action, this confusion cannot arise.

It was objected that if this levy can be supported, it will enable any judgment creditor to satisfy his executi onby levying on any land, to which the title of the tenant in possession is defective, though never belonging to the debtor. It is a sufficient answer to this objection, that, should such an attempt be made to satify a judgment, the tenant in possession would bring his action of trespass against the creditor and officer, who could not justify, unless the estate levied upon was the debtors.

If the demandant was in by disseizin of *Thomas Boylston's* heirs, his seizin would be sufficient against all persons but the disseizees. The same would be the case, if an attorney were to take possession for himself instead of his principal; his seizin would be sufficient against every person but his principal. And in the present case, if the demandant has lawfully entered, that is sufficient to compel the tenant to shew his title.

On the whole, if the demandant did enter lawfully, he has a right to avail himself of the fruits of his levy; or, as was before observed, there is a right without a remedy. Before the statute of 1788, c. 51. an administrator thus stated unquestionably had a right; and since that statute, though it is provided that he shall be seized and possessed to the sole use and behoof of the widow, &c. yet he has a right, at all events, to the seizin against all the world, until some person shall appear entitled under the statute, in capacity of widow, next of kin or creditor.

The action was then continued *nisi*, and at the following March term at *Boston* the opinion of the court (except the *chief justice*, who did not sit in the cause) was delivered as follows by

PARKER, J. This action is brought to recover seizin and possession of the lands described in the writ, which were set off by the sheriff to the demandant, and seizin delivered to him in part satisfaction of an execution, which issued on a judgment recovered by him in this court, August term, 1804, in his capacity of administrator *de bonis non*, with the will annexed of *Thomas Boylston*, against the estate of *Moses Gill* deceased. The judgment, execution and levy are set

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forth in the declaration; and possession is demanded against *Carver* the tenant, who is alleged to have entered against law, and disseized the demandant.

All the evidence offered by the demandant to maintain his action was rejected by the judge at the trial, in order that the general question might come before the whole court, whether this action can be maintained by the plaintiff in his capacity of administrator, it not being shewn, or offered to be shewn, that the possession of the land was necessary, in order that the same might be sold to discharge the debts and legacies of the deceased testator.

The counsel for the tenant have insisted that an executor or administrator, as such, has no interest in, or power over the real estate of the testator or intestate, so as to enable him to recover possession of it by an action; but that the heirs of the deceased, instantly upon his death, became seized of his estate; and if by abatement or intrusion they are prevented from entry, they and not the administrator, are entitled to an action. And to maintain this position, they cited the case of *Henshaw* vs. *Blood & al.* in this court, in which it was decided that the condition of an administration bond is not broken by neglecting to return an inventory of the real estate of the intestate.

There is no necessity of deciding in this case, whether an administrator can maintain an action for the recovery of lands, which his intestate owned in his lifetime, and of which he died seized, where the personal estate is insufficient to pay the debts of the deceased.

This case presents a very different question. The testator here was never seized of, and had no claim to this land. After his death, the demandant, his administrator, instituted a suit to recover money due to the estate, and not being able to satisfy the judgment he recovered in money, or by the sale of chattels, he caused the execution to be levied on land, of which the debtor died seized. The demanded premises were appraised and set off to him in part satisfaction of his execution: and he was put into actual possession by the sheriff: after which *Carver* entered and ousted him. Shall he be reinstated? is the question presented in this action.

The statute of 1788, c. 51. § 3. enacts, "that whenever "any executor or administrator shall recover judgment for "any sum of money, whereon execution shall issue, and "lands, tenements or hereditaments shall be set off to the "said executor or administrator, in discharge of the said ex- "ecution, the said executor or administrator shall be seized "and possessed of the whole estate in the lands, tenements "or hereditaments so set off, to the sole use and behoof of "the widow and heirs of the deceased intestate, or to the "residuary legatee or legatees of the testator, as the case "may be."

It has been argued that the demandant in this action, when he caused the execution to be levied, and was put into possession by the sheriff, became seized to the use of the heirs of his testator, and that by force of the statute of 27 *Hen.* 8. c. 10. for transferring uses into possession, which may be considered as the common law of this country, the possession of this land was instantly transferred from him to the heirs or legatees, so that the entry of the tenant never could be construed a disseizin of the demandant; but if a disseizin at all, was done to the heirs or legatees.

If this be the true construction of the statute, perhaps the argument is conclusive. But we are of opinion that notwithstanding the words of the statute, declaring that the seizin of the administrator shall be to the use of the heirs and legatees, the true intention of the legislature, as expressed in the statute, taking the whole of it together, was to vest a *trust estate* in the administrator, until certain things required by the statute shall have been performed by him; and that neither the legal estate, nor the possession vests in the heirs, until the same has been regularly apportioned and distributed in the probate office; or at least until the administration has been settled, or other legal measures have been taken by the judge of probate, to ascertain whether the land levied upon will be wanted to discharge debts and legacies, or to satisfy the expenses of the administration. And the administration bond is security for the faithful discharge of duty by the administrator respecting land so held by him, it being only a substitute for so much money, which would otherwise have come into his hands, and

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which may still be converted into money, should there be a redemption by the debtor, or his legal representatives: which distinguishes this case clearly from that of *Henshaw* vs. *Blood & al.* the decision of the court in that case being nothing more than that the administrator is not accountable on his bond for the real estate of the intestate, belonging to him in his lifetime, and of which he died seized.

That this is the true construction of the statute is manifest from a recurrence to the fourth section. This section provides that if the person, whose land has been levied upon, his heirs, executors or administrators, redeem the same within the time therein limited, the executor or administrator shall be entitled to receive the money, and is authorized, empowered, and directed to discharge the premises levied upon by release, quitclaim, or other legal conveyance. Now this provision would be at best absurd, if the construction of the statute contended for by the counsel for the tenant should prevail: for notwithstanding the administrator had been a mere conduit, to transfer the estate to the widow and heirs, who, according to this construction, must have the legal and actual seizin, all privity of estate being lost by the administrator the instant the seizin was delivered to him by the sheriff; yet in case of redemption, the money is to be paid to him, and he alone is to execute the legal conveyance, which is to restore the estate to the debtor.

A similar provision in the same statute, relative to land mortgaged to the deceased, and taken possession of by his executor or administrator in virtue of a judgment recovered upon such mortgage after the decease of the mortgagee, still further shews that the legislature intended that the custody and possession of the land should be in the executor or administrator, until the estate should cease to be conditional. They are to obtain license to sell, if necessary for the payment of debts, legacies, annuities, or charges of administration; they are to discharge the mortgage, in case redemption should be offered; and if neither of these things happen, the judge of probate is to distribute the same as personal estate. Unquestionably the administrator is to hold the estate, until his functions touching it are performed. And we cannot see how the widow or heirs in this case, or in the case of land delivered to the

executor or administrator, to satisfy a debt due to the estate, can have any right of entry, or can maintain any action for the possession, until distribution has been made by the judge of probate according to the statute.

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The demandant therefore as administrator, had a right to shew the judgment recovered by him, the execution, the levy and seizin under it: and shewing these would have legally maintained his action, unless a right to retain the possession had been shewn by the tenant. As he was prevented from shewing his title, the verdict must be set aside, and a new trial granted.

NATHAN GROUT, ADMINISTRATOR, PLAINTIFF IN ERROR,

versus

ENOCH CHAMBERLIN.

An administrator *de bonis non cum testamento annexo* cannot maintain a writ of error to reverse a judgment recovered by the original executor.

THIS was a writ of error brought by *Nathan Grout*, as he is administrator *de bonis non cum testamento annexo* of *Elizabeth Grout* deceased. The original action was commenced by the said *Elizabeth* in her lifetime upon a bond of the said *Enoch* in the penal sum of 500 dollars, conditioned for the payment of an anuity of 20 dollars *per annum*. The said *Elizabeth* dying pending the original suit, *Bela Grout* her executor came in and was admitted to prosecute, and judgment was rendered for him in his said capacity for the sum of twenty dollars.

The error assigned was that the judgment should have been for the forfeiture of the whole penalty, and execution should have been awarded for the amount actually due, as is provided by *stat.* 1798. c. 76. § 6.

At the last October term in this county, *Ward* for the defendant in error moved the court to quash the writ of error, on the ground that there was no privity between the present plaintiff in error, and *Bela Grout* the executor of the deceased obligee, in whose favour the original judgment was rendered.

Grout, admr. vs. Chamberlin in error.

Bigelow opposed the motion, and contended that there was sufficient privity in interest between the plaintiff in error and the executor to entitle the plaintiff to this writ, and he cited the cases in the margin(1).

The action was continued to this term, when the opinion of the court was delivered by

PARSONS, C. J. This is a writ of error brought to correct the errors of a judgment recovered by *Bela Grout*, as executor of the last will of *Elizabeth Grout* deceased, on a bond given to her by the defendant in error. The writ states that since the judgment the said *Bela* has died, and that the plaintiff in error is administrator *de bonis non* with the will annexed of the said *Elizabeth*. And we are called upon to decide whether from these allegations the plaintiff has, or has not entitled himself to this writ of error. And we are of opinion that he has no title to sue this writ, because there is in law no privity between the executor, and the administrator *de bonis non cum testamento annexo ;* and a judgment recovered by the executor cannot be executed by the succeeding administrator.

If the judgment has been satisfied, then the debt, for which it was rendered, has been administered ; and if the judgment has not been satisfied, then it has become ineffectual, and the administrator *de bonis non*, &c. may maintain a new action.

The law is the same where an administrator recovers a judgment and dies, the succeeding administrator cannot execute this judgment, but may bring a new action.

There are several cases in point, all of which it is not necessary to mention : as *Yelv.* 33. *Gaites* vs. *Gough.*—*Yelv.* 83.—*S. P.* and *Latch*, 140.

By an English act of parliament [17 *Car.* 2. c. 8.] not in force here, provision is made that the second administrator may execute a judgment recovered on verdict by the first administrator, and it is to be wished that we had some statute including the same, and perhaps some further provisions.

Now if the second administrator cannot execute a judgment recovered by a former executor or administrator, it is very

(1) 3 *Co.* 23.—4 *Co.* 123.—*Co. Lit.*209. *a.*—2 *Saund.* 149.—2 *Sid.* 122.—*Cro. Jac.* 3.—*Cro. Car.* 167.

clear that he cannot bring error to reverse it; for it has become ineffectual if not satisfied, and if satisfied, the debt recovered by it has been administered.

Grout, admr. *vs.* Chamberlin *in error.*

The writ must abate, and the defendant in error is entitled to costs.

NATHAN GROUT, ADMINISTRATOR,

versus

ENOCH CHAMBERLIN.

THIS was an action of debt on the bond of the defendant, upon which the judgment referred to in the preceding case between these parties was rendered.

A judgment recovered by an executor is no bar to an actionbrought by the administrator *de bonis non cum testamento annexo* for the same cause.

The defendant pleaded the former judgment in bar. The plaintiff demurred to the plea, and the defendant joined in demurrer.

Curia. We are of opinion that the plea is bad, because a judgment recovered by an executor cannot be executed by the administrator *de bonis non cum testamento annexo;* but is become ineffectual, and the second administrator may maintain a new action.

For the authorities in this case we refer to the opinion of the court in the case of *Grout* vs. *Chamberlin,* in error; the two cases resting for decision on the same principles.

ISAIAH BRUCE *versus* SAMUEL LEARNED.

The statute of replevins [1789, c. 26.] has prescribed six per cent. on the replevin bond as the measure of the defendant's damages, when the plaintiff shall fail to prosecute his suit; and when goods taken in execution are unlawfully replevied: in all other cases his damages are left to be assessed according to the magnitude of the injury. Upon a review of an action, in which debt, damages or land is demanded, the party in whose favour the error of the former judgment is corrected, is the prevailing party within the provision of the statute of 1784, c. 28. § 9. and is entitled to his costs.

In replevin a verdict being found for the defendant and damages assessed, the plaintiff reviews the action, and obtains a reduction of the defendant's damages: the defendant shall notwithstanding recover his costs.

THIS action was replevin for a horse. The defendant pleaded property in himself in bar, and prayed judgment for a return and damages for the detention. The plaintiff in his replication affirmed the property to be in himself, and on this the parties were at issue. A verdict was found for the defendant and damages assessed for the detention.

The plaintiff reviewed the action, and it was tried on the review before *the chief justice* at the sittings here after the last October term. The jury were directed that if, in their opinion, the plaintiff had failed to maintain the issue on his part, they should return their verdict against him, and should assess damages for the defendant, for the injury he had suffered by the wrongful replevin and detention: that in this action there was no statute prescribing to them a rule, by which they should assess the damages, but they were to be measured by the nature and degree of the injury the defendant had sustained according to the common law. The jury found a verdict for the defendant, but assessed his damages at a less sum than was assessed by the jury on the former trial, and less than six per cent. on the replevin bond.

The plaintiff excepted to the direction of *the chief justice* because the jury were not instructed to consider six per cent. on the replevin bond as the measure of the damages, agreeably to the statute of replevins, [1789, c. 26. § 4.] and moved the court that the verdict should be amended by increasing the damages to that amount: and if the said motion should be overruled, that a new trial should be granted him for the purpose of so increasing the damages: and if both the said motions should be overruled, he prayed that the defendant might not be allowed to tax his costs against him, but that he might be allowed his costs against the defendant, because he had finally prevailed in his suit.

The action was continued *nisi* for the consideration of

these motions, and at the last March term in *Suffolk*, the counsel on either side being present in court,

Bigelow, for the plaintiff, cited the section of the statute before referred to, by which it is enacted that when goods are distrained or attached, which are claimed by a third person, and the person thus claiming the same shall think proper to replevy them, and shall neglect to enter and prosecute the suit, the defendant on complaint may have judgment for a return and the damages for the taking to the amount of six per cent. on the bond with costs. And if upon a trial of the issue, judgment shall be rendered for a return, the interest of six per cent. upon the penal sum of the bond shall be taken as a rule for estimating the damages, in case they were taken upon execution.

In the case of *Pike* vs. *Huckins*(1), the court, in giving a construction to this provision of the statute, had solemnly decided that the rule was uniform for estimating the damages, that they were in all cases to be *six per cent.* on the penal sum of the bond.

Upon the motion respecting costs, *Bigelow* contended that the defendant, having prevailed upon both trials, was entitled to his costs. And he said that the provision respecting costs upon a review [stat. 1786, c. 66. § 3.] extended only to cases where the review was prosecuted by the defendant.

Ward, for the plaintiff, insisted that the six per cent. was established as the measure of damages only in cases where the goods replevied have been taken on execution by an officer, and a third person pretending a claim to them replevies them, and on trial judgment is rendered for a return, and in cases where the plaintiff in replevin neglects to enter, or fails to prosecute his action. But the provision did not apply at all to the present case. The horse in this case had not been taken on execution; neither was there here any third person; nor had the plaintiff neglected to enter, or failed to prosecute his action.

The defendant in this action is entitled, according to the case of *Billerica* vs. *Carlisle*(2), to the difference of the

(1) 1 *Mass. Rep.* 421.
(2) 2 *Mass. Rep.* 158.

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damages found by the first jury and the second, and to the costs of the review.

At this term the opinion of the court was delivered by

PARSONS, C. J. On examining the statute of replevins, it appears that six per cent. is there prescribed as the measure of damages in two cases. If the plaintiff shall fail to prosecute his suit, the defendant on complaint may have a return awarded with his costs and damages to the amount of six per cent. on the bond. This provision was made, to save the defendant the expense and delay of going to a jury to assess his damages, and to mulct the plaintiff for abusing a legal process to take from another his chattels, when he would not prosecute his writ.

If the plaintiff has unlawfully replevied goods seized on execution, and the officer has judgment for a return, he shall also have his damages equal to six per cent. on the penalty of the replevin bond for the use of the creditor, as a punishment for unlawfully delaying execution. And it may be within the equity of this last case, if the plaintiff shall have unlawfully replevied goods duly attached upon original process, if execution has been thereby delayed.

As these are the only cases, in which the statute has prescribed a measure for the defendant's damages; in all other cases his damages must be assessed, according to the magnitude of the injury he has sustained, agreeably to the rule of the common law. We therefore think that the direction of the judge was in this case right.

The defendant has moved that he may have his costs of the review, notwithstanding the jury have assesed less damages for him than were before assessed, on the ground that he has substantially prevailed in the cause.

The ninth section of the statute of 1784, c. 28. includes the general provision for costs; and it is there enacted, that in all actions, as well *qui tam* as others, the party prevailing shall have his costs. In this review the plaintiff has obtained a reduction of the former damages, and so far the judgment must be reversed for his benefit. If on this ground he is to be considered as the party prevailing, the motion cannot be granted, but the plaintiff must have his costs.

In the statute of replevins [1789, c. 66.] no provision is expressly made respecting costs, but in two cases. When the first judgment is against more than one defendant jointly for damages, and all the defendants will not review, any one or more of them may review, and if the former judgment be reversed in whole or in part, the defendants reviewing shall have their costs, as well as the damages they have erroneously paid. So if the first judgment was against several for several damages: each defendant may review, and on wholly or partially reversing the judgment as to himself, he shall have his costs, and the damages he has erroneously paid.

But no good reason can be assigned why costs should be given to some of the defendants when some only review, and not to all the defendants when all review, and reverse the judgment wholly or in part. For the same reason, when the plaintiff has been curtailed of his just demand by an erroneous verdict, if he review the cause, and have the error corrected by an increase of his damages, he ought to have the costs of his review. It has therefore been the immemorial usage in reviews of actions, in which debts, or damages, or lands have been demanded; if the plaintiff has failed in recovering his just demand, or has recovered more in the original suit, to consider the party, in whose favour the error has been corrected, as the prevailing party and entitled to his costs.

Let us now consider whether replevin of chattels, in which the parties are at issue on the property, is within the principles on which this usage is founded. The plaintiff, having by the service of the writ obtained the possession of the goods replevied, prosecutes it to obtain judgment for damages and costs against the defendant for the caption and detention. These are the objects of his suit, and if he fails in all of them, surely he cannot be considered as the prevailing party.

But the defendant not only resists the plaintiff's claims, but he also complains of an injury arising from the service of the writ. He demands back the chattels, with damages occasioned by the replevin, and his costs in the defence. If the defendant fails in his demands he is not the prevailing party. If the plaintiff does not maintain his property, he must fail in

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all his points, whether the defendant recover greater or less damages for the taking and detaining of his chattels by the plaintiff. For the defendant's demands arise in consequence of the unlawful replevin, and had no existence before the writ.

The plaintiff having failed in his action, in consequence of which the defendant has had judgment for a return and damages, he brings his writ of review to obtain relief from the errors in the first judgment. In his action of review the same points are in issue as before; for by the statute the cause must be tried on the former issue, in the same manner as if there had been no verdict. A review therefore is substantially, though not formally, a new trial; and if the former judgment be reversed or amended, it is a legal consequence of a different verdict. The plaintiff has therefore precisely the same allegations to prove, before he can obtain a verdict in his favour. If he fail in all his allegations, he cannot be said to be the party prevailing. And although he may have a less sum to pay the defendant in consequence of his failure, than was assessed in the first verdict; yet he has not prevailed in his cause because the defendant could have recovered no damages whatever, unless the plaintiff had wholly failed in his action.

The distinction between replevin and other actions, in which the plaintiff demands a debt, or damages, or lands, is very clear, because the magnitude of the debt or damages, and the quantity of the land is involved in the plaintiff's original demand, as well as his title to recover any thing. But in replevin the demand of the defendant is founded on the legal process sued and prosecuted by the plaintiff. Therefore in the other actions, if the plaintiff reviews, he cannot have costs, unless he supports his demand to more money or land than the former jury gave him. So if he review in replevin he cannot have his costs, unless the jury increase his former damages, or find his property in the chattels, which was negatived by the first verdict: but he cannot be considered as prevailing, only because the second jury may assess smaller damages for the defendant.

On this principle, if the replevin be for divers chattels, the property in all which is in issue; if his property be proved in some of the chattels only, he shall have damages for their detention and costs, although the defendant shall have a return

of the other chattels and his damages. And if the plaintiff review, and the second jury disaffirm his property in the chattels found to be his by the first verdict, but affirm his property in the residue, he shall have damages and costs, although the defendant has a return, and perhaps greater damages than he had before. For the plaintiff has prevailed where he before failed, and could not have his claim established, but by suing his review.

There is a clause in the statute regulating reviews, which supports these conclusions. It is there enacted that if the defendant in replevin would review, and stay execution on the former judgment, he must give bond conditioned to pay all such damages as the plaintiff shall recover with double costs, without distinguishing whether the plaintiff's damages are increased or diminished. If the plaintiff, when defendant in review, is entitled to his costs, although his damages may be reduced, because he has established his property in the chattels in himself, then by the general rule, that where costs may be received, they shall *vice versâ* be paid, if the plaintiff fail in establishing his property in the chattels, although the defendant may recover his damages, yet he shall have his costs.

We are therefore satisfied that, upon a fair construction of the statutes giving costs and regulating reviews, the plaintiff has not prevailed in this review, and the defendant is entitled to his costs. And this construction is certainly agreeable to the justice of the case; for it would be extremely hard on a defendant contented with the first verdict, to be again called into court on review to litigate the plaintiff's claims, and when the claims were defeated, to have the plaintiff's costs to pay, because the jury had reduced his damages arising from the injury he had sustained by the plaintiff's writ.

WILLIAM HUNT

versus

DANIEL WHITNEY, ADMINISTRATOR.

Where one of the parties to an action, which by law survives, dies pending the action, and his executor or administrator becomes a party pursuant to the statute of 1783. c. 59. § 1. and afterwards the other original party dies, the action still pending, his executor or administrator may become a party; and if he neglects so to do after notice, judgment will be entered against the estate of his testator or intestate.

When an executor or administrator has represented the estate of his testator or intestate to be insolvent, and a commission is thereupon awarded, there is an *apparent* insolvency: When a distribution is decreed, the insolvency becomes *absolute*.

WILLIAM HUNT brought his action of *assumpsit*, as indorsee of a promissory note against *Daniel Whitney*, the defendant's intestate, as maker of the note. Pending the action the original defendant died, and administration of his estate was committed to the now defendant, who was afterwards admitted, upon his own motion, to take upon himself the defence of this action, pursuant to the statute of 1783. c. 32. § 10. which provides that in case of the death of any party to any action or suit depending in this court or in the common pleas, the executor or administrator of such deceased party, whether plaintiff or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such action until final judgment. The estate of the said intestate being represented insolvent, commissioners were appointed by the judge of probate to receive and examine the claims against the same; and the demand for which this action was instituted, was among others received and reported by them. The estate furnished no dividend for the creditors, being wholly absorbed in the charges of administration.

After the present defendant had become a party to the suit, *Hunt* the plaintiff also died, leaving *Eliakim Morse* and *Jane Hunt* his executors, whom the defendant notified to appear at the last October term of this court, and take upon themselves

In an action brought against an executor or administrator during an apparent insolvency, the defendant may abate the plaintiff's writ, by pleading the insolvency and admitting the creditor's demand: if he dispute the demand, the plaintiff may have judgment but not execution: if the action be commenced before an apparent insolvency, it shall be continued until it shall appear whether there is or is not *such* an insolvency, and if there is, the plaintiff, as before, may have judgment, but not execution.

The second exception in sect. 2. of the statute of 1788. c. 66. applies only to cases, in which an apparent insolvency has taken place within the year.

If pending an action commenced for a just cause, an absolute insolvency of the estate takes place, and the whole estate being legally appropriated furnishes no dividend to the creditors, the plaintiff cannot have judgment; neither can the executor or administrator recover costs.

the prosecution of this action, at which term the defendant moved the court that the said executors might be called to prosecute the suit against him, and they not appearing, he moved that a nonsuit might be entered, and he have judgment for his costs, pursuant to statute of 1783. c. 59. § 1. by which it is provided that in all actions pending in the supreme judicial court, or in any court of common pleas, if either party shall die before final judgment, and the executor or administrator of the deceased party, after taking upon himself the said trust, and after being duly served with a notification from the clerk of the court where such suit is pending fourteen days beforehand, shall neglect or refuse to become a party to the suit, the court, in case the cause of action does by law survive, may enter up judgment against the goods and estate of the deceased party, as it might have been entered, in case the executor or administrator had voluntarily after such death made himself a party to the suit.

This motion was then opened by *Bigelow* for the defendant and was opposed by *Ward*, who had been of counsel for the original plaintiff, but who now appeared as *amicus curiæ*.

The cause stood continued for advisement, and now at this term the opinion of the court was delivered as follows by

PARSONS, C. J. [After a brief recital of the history of the action.] The defendant having summoned the executors of the plaintiff, moves that they may be called, and, if they do not appear, that he may have judgment for costs against them as upon a nonsuit. The counsel for the executors in fact, but appearing as *amicus curiæ* objects, because the statutes relating to this subject do not extend to a case, where both the parties have died.

The words of the statute extend to all cases where either party shall die pending an action, which by law survives.— The object of the statute is remedial, and it ought to have a liberal construction. If either of the original parties die, his executor or administrator may be a party, because the action might be commenced by or against an executor or administrator, in which the survivor may be a party. If therefore on the death of one of the original parties, his executor or administrator has, pursuant to the statutes, been made a party,

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he is now a party to an action pending; and if the other original party afterwards die, it is a case within the words of the statute ; and it is also within the reason of it, because a new action for the same cause may be commenced, in which the executors or administrators of both the deceased parties shall be the parties. By a liberal and reasonable construction of these statutes, we are of opinion that the executors of *Hunt* might have voluntarily appeared and prosecuted it, and may therefore be compelled to prosecute or suffer a nonsuit to be entered.

The counsel for the executors, in further support of his objection, has argued from the great injustice that would be done in this case, if they were compellable to prosecute or be nonsuit, because by the death of the original defendant insolvent, and the settlement of the estate in the probate office, the cause of action is taken away ; and if they appeared, it must be for the purpose of having a judgment for costs against their testator, in an action duly commenced, and for legal cause.

If this objection were well founded, it would certainly induce the court to give such a construction to the statute as would remove the foundation of it, if it could be done consistently with the manifest intent of the legislature. We have therefore considered the several provisions of our insolvent laws that relate to this subject, supposing the facts alleged by the counsel to be admitted.

The object of our insolvent laws is the distribution *pro ratâ* of the effects of a deceased insolvent debtor among all his creditors, by the executor or administrator, except debts due for all rates and taxes, and debts due to the Commonwealth, and for the last sickness and necessary funeral expenses of the deceased. All the personal estate of the deceased, and all the real estate, of which he died seized in fee simple or in tail, compose the funds for the payment of his debts ; and they are to be collected and reduced to cash by the executor or administrator. The claims of the creditors, and the distribution of the effects are adjusted and decreed in the probate court, and by proceedings under its commission. The executor or administrator has a year, after he has taken upon himself the trust, to ascertain the probability of the insolvency of deceased. He will ascertain, as well as he can, the

amount of the debts, which he will compare with the effects of which he has knowledge, and thus form his opinion. If he believes the estate to be insolvent, he will represent these facts to the judge ; and if the judge shall allow the representation, and award a commission of insolvency, the estate is then *apparently* insolvent ; and the law will not permit any of the effects to be taken from the executor or administrator by legal process, to satify the demand of any creditor : but a demand may be settled by legal process, so far that it may be evidence of the amount of the claim.

If on the return of the commission, and the settlement of the administration account, the judge shall decree a distribution of the effects, then there is legal evidence of an *absolute* insolvency and not before. For the insolvency may depend on a claim allowed by the commissioners, which may be disputed by the executor or administrator, and defeated by a trial at law. Upon an absolute insolvency the executor or administrator must administer the effects pursuant to the decree. As it has been observed that, after an apparent, and before an absolute insolvency, the creditors may ascertain the amount of their claims by legal process, it may be necessary to consider the action of a creditor.

The executor or administrator may become a party defendant, either during an apparent insolvency, or before, or after it be defeated by neglecting or refusing to settle an administration account, or after it has become absolute by a decree of distribution. In the first case the action may be brought in consequence of exceptions to the report of the commissioners, when it is expressly provided that the creditor shall proceed to judgment, which shall be conclusive evidence of his claim, but he shall not have execution : or the action may be brought without submitting the claim to the commissioners. In this case the defendant may abate the plaintiff's writ, by pleading the apparent insolvency, and admitting the creditor's demand. But if he dispute the demand, the plaintiff may proceed to judgment, as conclusive evidence of his claim to be laid before the commissioners, but shall not have execution. For it would be an unreasonable construction of the act, to permit the defendant to abate the writ when he disputed the demand, and to drive

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the creditor before commissioners, whose report might be excepted to by the defendant, and the plaintiff compelled again to resort to a court of law for justice.

If the action be commenced, before an apparent insolvency, it shall be continued, until it shall appear whether there is, or is not an apparent insolvency: because until there is an apparent insolvency, if judgment be rendered for the creditor he will be entitled to execution, which would be injurious to the other creditors, if the estate should in fact be insufficient to pay all the debts. But after there is an apparent insolvency, the plaintiff may proceed to judgment, as evidence of his claim before commissioners, but he cannot have execution.

The doubt, which has been conceived as to this last point, has arisen from the direction in the statute, that actions, commenced before the estate be represented insolvent shall be continued, until it appear whether the estate is or is not insolvent. If by this last insolvency is intended an absolute insolvency determined by a decree of distribution, then the action must be continued to the time of that decree. But when the statute further provides that when it is known that the estate is insolvent, the proceedings shall be conducted as aforesaid, that is,to judgment as evidence of the claim, and not to executiou to satisfy it, it seems to remove the doubt. The judgment, if rendered after an absolute insolvency, would be useless to the creditor; for the commission is closed, and all the effects distributed, to the total exclusion of his demand. But if an apparent insolvency be intended, then a subsequent judgment will be evidence of his claim, and he may have it allowed, and receive a *pro ratâ* dividend of the effects.

There is one difficulty in the statute of 1783, c. 66. § 2. It is there provided that an executor or administrator shall not be compelled to defend any action commenced against him within twelve months after he has accepted the trust, with certain exceptions, one of which is, when the action is brought to ascertain a claim that is contested. To preserve a consistency with the other statutes, this exception must be confined to a case, in which an apparent insolvency has taken place within the year. Upon this construction the sev-

eral provisions are consistent; and it is manifest that during an apparent insolvency the executor or administrator may be compelled to defend an action, so far as to ascertain a claim which he contests, but not to be obliged to satisfy it.

But where there is an apparent insolvency pending the action, the creditor is not obliged to proceed to judgment to ascertain his claim. It may not be the subject of dispute, and may be ascertained without difficulty. But he need not discontinue his suit, as the estate may not eventually become absolutely insolvent, or the apparent insolvency may be defeated by the negligence of the executor or administrator in settling his account, or contrary to his expectations, his claim before the commissioners may be disallowed or disputed. In the two first cases he may proceed to judgment and execution, and in the last to judgment. There is therefore no impropriety in continuing his action in court, while he submits his claim to the commissioners. If there should be an absolute insolvency, the executor or administrator may then plead a special *plene administravit*. If the creditor admits the truth of the plea, he can have no judgment, for he must claim his distributive share under the decree, which is a new cause of action, if payment be refused.

But can the administrator have judgment against him? The action was well commenced, and for a legal cause; but the effect of it has been avoided, not by any objection to the form, or to the original merits of it, but by a subsequent appropriation of the assets pursuant to law. Does therefore the executor or administrator *prevail* against the creditor, within the intent of the statute of 1784, c. 28. § 9. giving costs to the party prevailing? certainly this construction would be unjust, as the plaintiff is in no fault, but the misfortune of trusting a debtor unable to pay. If the defendant executor or administrator cannot have judgment, the consequence is that all further proceedings in the action must be stayed, and that thereof the parties go without day. If it should be said that the executor or administrator ought to have some means to bar any other action for the same cause, the answer is, that a confession by the plaintiff on record of the truth of the de

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fendant's plea of *plene administravit* would forever be an estoppel to him in maintaining another action for the same cause.

It is unnecessary to consider the cases, where a creditor sues after an apparent insolvency is defeated by the neglect or refusal of the executor or administrator to settle his account, or where the action is brought after an absolute insolvency. In the former case the proceedings are the same as where there has been no apparent insolvency ; and in the latter case the plaintiff will be barred by a plea of a special *plene administravit*, unless he is able to satisfy it.

In applying these principles to the objection made by the counsel for the executors in the present case, we shall consider Mr. *Hunt* as now the plaintiff: for if the administrator would be entitled to costs against him, no good reason can be given, why he should not have costs against his estate when dead. *Hunt* therefore brought his action in due form, and for a just debt, but pending the action, by an insolvency of his debtor, the effects are all specially appropriated, and he cannot have judgment against the goods and estate of his debtor. The administrator shews these matters to obtain costs ; the truth of them is admitted. And does the administrator prevail within the intent of the statute giving costs ? Would *Hunt*, at common law, be *in misericordiâ* for his false clamor? We think not; that no judgment for either party could be rendered but that all further proceeding would stay. In this case therefore the administrator cannot recover costs, and so the objection of the counsel for the executors is not well founded, and the executors of the original plaintiff must be called to appear,upon pain of a nonsuit being entered. But if they appear, no costs can be taxed against them, on the allegation of the administrator, that the effects of the original defendant have been specially appropriated pursuant to law since the rightful commencement of the original suit.

COMMONWEALTH *versus* THE INHABITANTS OF CAMBRIDGE.

THIS was a *certiorari* to the court of sessions directing them to certify the record of their proceedings relative to the making alterations in the highway leading from the line of the county of *Worcester*, through sundry towns in this county to *West-Boston-Bridge*.

The sessions are bound to notify the town in which an alteration of an highway is prayed for, previous to an adjudication of the common convenience or necessity of such alteration.

The writ issued at the motion of the respondents, and upon inspection of the proceedings it did not appear that notice had been given to the town of *Cambridge*, previously to the appointment of a committee to make said alterations, or to the adjudication that the same were of common convenience and necessity.

Curia. The proceedings in this case must be quashed. The sessions have undertaken to adjudge that a certain highway be laid out in *Cambridge*, it being of common necessity and convenience, without notifying or hearing that town upon the question before the adjudication. By this adjudication the rights and interests of the inhabitants of *Cambridge* are directly affected, as they must be at the expense of making the way, when laid out, and of compensating the owners of the land, over which it may be located, for any damages they may sustain by the location. And it is an essential principle of natural justice that every man have an opportunity to be heard in a court of law upon every question involving his rights or interests before he is affected by any juridical decision of the question.

JAMES PRESCOTT *versus* JOHN TRUEMAN. 7 Johns 358

THIS was an action of *covenant broken*. The declaration contained several counts, in the fourth of which the plaintiff alleges that the defendant by his deed duly executed, da-

A paramount right is an incumbrance within the meaning of a covenant in a conveyance of land that the same is free of all incumbrances; and in an action on such covenant, if the plaintiff has, at a fair price extinguished the incumbrance, such price shall be the measure of the damages: if the plaintiff has not removed the incumbrance, he shall recover only nominal damages.

Prescott vs. Trueman.

ted September 26th, 1800, in consideration of three hundred dollars paid him by the plaintiff, granted and sold to the plaintiff in fee simple a certain messuage and lands therein described; and among other things covenanted that the granted premises were free of all incumbrances. The plaintiff then sets forth that before and until the 19th day of March, 1795, one *Thomas Symmes* was seized in fee of the said messuage and lands, having a good and perfect title to the same, and being so seized, by his deed of that date, for a valuable consideration conveyed the same to one *Thomas Russell* in fee, and the said *Russell*, on the 8th day of April, 1796, died intestate seized of the right to the same premises, from whom the said right descended and came to his children and heirs; and the plaintiff further avers that at the date of the defendant's said deed he had not, nor hath he at any time had any entry, right or title to the premises aforesaid, but by and under the said *Symmes*, who thereof disseized the said *Russell* on the 4th day of August, 1795; so that the said right of the said children and heirs of the said *Russell*, to have the said premises as aforesaid, was at the time the defendant executed his deed aforesaid, and still continues to be an incumbrance upon the premises aforesaid; and therefore that the same were not then free of all incumbrances: and so the defendant his covenant aforesaid hath not kept, but hath broken the same.

To this count the defendant demurred generally, and the plaintiff joined in demurrer.

Ward, in support of the demurrer, contended that the facts set forth in the plaintiff's count did not amount to a breach of the covenant relied upon, and he cited the cases of *Marston* vs. *Hobbs*(1) and *Bickford* vs. *Page*(2). And he mentioned an action of *Tufts* vs. *Brazier*, which was similar to the present, and there the plaintiff became nonsuit.

Bigelow for the plaintiff. By shewing a fee simple, and a right of entry in *Russell's* heirs at the date of the defendant's deed, we shew an incumbrance of course, and a title in the plaintiff to recover damages, though no actual entry or eviction is stated. The question of the amount of the damages.

(1) 2. *Mass. Rep.* 433.
(2) *Ibid.* 455.

which the plaintiff shall recover will be determined by the jury on the general issue, which is joined on another count, and on which the plaintiff will prove all the damages he has sustained. Perhaps a dormant incumbrance will give him but nominal damages.

It is true that actions of this kind are not to be found in the *English* books: but the reason of this is, that their forms of conveyance are different from ours. The practice there is to covenant that the grantor is seized by an *indefeasible* title in fee. As we have no such covenants in use here, the court will give to our conveyances such a construction as will afford the same remedy and relief as are given in *England* on their covenants of a similar intent. If this action does not lie, the plaintiff is without remedy.

The action was continued *nisi* for advisement, and at the March term following in *Suffolk* the opinion of the court was delivered by

PARSONS, C. J. The action is covenant broken, and comes before us on a general demurrer to the fourth count. In this count the plaintiff alleges that *Trueman*, on the 26th of September, 1800, being then seized in fee of certain lands in *Westford*, which seizin he acquired by a conveyance from *Thomas Symmes*, who was in by disseizin, by his deed of that date granted and sold the same to the plaintiff in fee; and covenanted that the said lands were free from all incumbrances. The breach alleged is that the heirs of the disseizee had, at the time when the deed was executed, a paramount right to the same lands.

All the facts contained in this count, which are well pleaded, are confessed by the demurrer. And the question is, whether this paramount right to the lands in the heirs of the disseizee, at the time of the grant to the plaintiff, is an incumbrance on the land granted.

No authority in point on either side has been produced; and the question must be decided on general principles. On these principles we are of opinion that every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance. We say consistent with the passing of the fee of the land by

Prescott vs. Trueman.

the conveyance, because if nothing passed by the deed, the grantee cannot hold the estate under the grantor. Thus a right to an easement of any kind in the land is an incumbrance. So is a mortgage. So also is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one third out of it. And for the same reason, a paramount right which may wholly defeat the plaintiff's title, is an incumbrance. It is a weight on his land, which must lessen the value of it.

It may be objected, that if a paramount right is an incumbrance, for which the grantee may recover damages, it would operate unreasonably and unjustly as between the parties to the covenant. For after the grantor had paid for the value of the lands in damages, the grantee would still hold it, and might never be disturbed by a dormant title. Or, if he should be afterwards evicted, the grantor would again be liable to the grantee on the warranty in consequence of the eviction.

If these inconveniences would follow from considering a paramount right as an incumbrance, the objection would have great weight, not only on this point, but also in cases of mortgages and claims of dower, which it is not disputed are incumbrances. But by duly attending to the rule in assessing damages, the objection will vanish. Where a subsisting easement is alleged as the incumbrance, the injury arising from the easement, or the fair and reasonable price paid by the grantee to extinguish it, of which the jury will judge, is the measure of the damages. If a mortgage, which is a collateral security is the incumbrance, the grantee can recover only nominal damages, unless he has removed it, because the mortgagee can compel the mortgagor to pay the debt by suing the principal security: but if the grantee has paid it, so that the mortgagor is discharged, the sum secured by the mortgage is the measure of damages. If a right to dower is the incumbrance complained of, if it be not extinguished by the grantee, he can recover only nominal damages. But if he has extinguished it, the jury will allow him in damages the fair price it necessarily cost him. For if this right be extinguished, it can never after be the foundation of any claim on the grantor.

So in the case before us, if the plaintiff, the grantee, has not extinguished the paramount right, but it still remains

against his title, he shall recover nominal damages only, for the reason on which the objection is founded. For the plaintiff shall not recover the value of the land against the grantor, and still hold the land on a contingency that he may never be disturbed in his possession. Neither shall the grantor, the defendant, after having once paid the value of the land, be afterwards called on by the plaintiff on a subsequent eviction. But if it should appear to the jury, who may enquire of the damages, that the plaintiff has, at a just and reasonable price, extinguished this title, so that it can never afterwards prejudice the grantor, they will consider this price as the measure of damages.

The law thus settled will be generally convenient. For if we are mistaken in the law, the grantee can have no remedy on the usual covenants in our deeds of conveyance, until he is evicted. In the mean time he may be unwilling to make improvements; and when he is evicted, the grantor may be unable to make him any compensation.

The covenant of seizin is not broken, for it is admitted that the grantor was seized: neither is the covenant of a right to convey broken, for a man seized has a right to convey: and on the warranty there is no remedy, until after eviction.

In *English* deeds there is sometimes inserted a covenant that the grantor has good right to convey an indefeasible estate in fee. On this covenant only nominal damages would be given, until the estate conveyed had been defeated, or the right to defeat it had been extinguished. This covenant is not usually, if ever, introduced into our deeds of conveyance, and upon the construction of covenants against incumbrances is unnecessary.

In adopting this construction, we have not been governed entirely by arguments *ab inconvenienti*, but have used the language of these covenants in the popular sense of the country, and consequently in the sense, in which it is generally understood by the parties to conveyances. A purchaser from one who is seized is not therefore obliged to wait in painful suspence, until he be evicted, before he can obtain an adequate remedy; but as soon as he can extinguish the incumbrance, he may call on his grantor for an indemnity.

Declaration adjudged good.

JOHN SHEPLE, EXECUTOR,

versus

ISAAC FARNSWORTH, EXECUTOR.

Where a legatee accepts a part of a legacy bequeathed, pursuant to an average or *pro rata* distributionof the property remaining in the hands of the executor, he has no further remedy for the part unpaid, until further estate is discovered.

THIS was an action of the case by the plaintiff, as executor of the last will of *Mary Sawtell*, against the defendant, as surviving executor of the last will of *Josiah Sawtell*, husband of the said *Mary*, for a legacy bequeathed to the said *Mary*, in and by the said last will of her said husband.

The case came before the court upon a statement of facts by which it appears that on the 30th of September, 1775, the said *Josiah* made his last will and testament, in which, among other things, was the following bequest, *viz.* "I also "give to my said wife, six hundred, sixty-six pounds thir- "teen shillings and four pence, to be paid by my executors "*out of such of my bonds and notes as she may chuse.*" And he made the defendant, with *James Prescott, & Oliver Prescott*, Esquires, both since deceased, his executors; the last being at the time of the testator's death judge of probate for this county. All the executors accepted the trust, and procured the will to be proved before the supreme court of probate.

After several transactions in the supreme court of probate, such as returning an inventory, settling accounts, obtaining leave to sell land, &c. which are not necessary to be particularly detailed, at the court holden in April, 1801, upon an adjustment of the accounts of the executors, it appeared that there was a balance in their hands of 896 dollars and 87 cents. And thereupon the court, after reciting that there was such a balance, and that as it appeared from the said will, that the money legacies due from the said estate amounted to 3533 dollars 31 cents, the real estate not specifically devised, and certainly known to be his, being already sold and accounted for; it was ordered that the executors should pay to the persons named in the order the several sums affixed to their names respectively, they being all the persons mentioned in the said will, who have claims for *money* legacies; the payment being in the proportion of 25 cents for every dollar of their respective legacies. This left in the hands of the executors a balance

of 13 dollars 54 cents only for future charges of administration. The legacy to the testator's widow was one mentioned in the order of court, and the average awarded therefor was 555 dollars 55 cents. After her death, and after her will, of which the plaintiff was made executor, was proved, the executors of *Josiah Sawtell* paid to the plaintiff the average above mentioned, and it was received by him as such.

Mrs. *Sawtell*, in her lifetime, was always ready to receive the amount of the legacy in the bonds and notes due to her husband's estate, and which were sufficient for that purpose: and she requested the executors to expose the bonds and notes in their hands, that she might make her election according to the bequest, which they neglected to do.

Upon these facts the cause was argued at the last October term at considerable length by *Ward* for the plaintiff, and *Bigelow* for the defendant, chiefly on the question whether this legacy was a specific one. *Ward* contended that it was a specific bequest of bonds and notes to the amount mentioned, and so not subject to reduction as other legacies. *Bigelow* argued that the testator's intention was merely to point out the fund, out of which this legacy was to be paid; and he said that in this country a bequest of a bond to any one but the obligor himself would be futile: it would give the legatee nothing but the paper and the wax.

But whether the legacy were or were not specific, *Bigelow* insisted that the plaintiff, by receiving the average ordered by the supreme court of probate, was barred of any further claim, "until" in the words of the order of distribution, "further estate is discovered."

Ward argued that our statute having given the party entitled to a legacy an action at the common law for its recovery, the probate court had no jurisdiction in the case, and the order of distribution among the legatees being merely void, the defendant might recover back the money paid under it, and thus enable himself to pay to the plaintiff the balance of the legacy bequeathed to his testatrix.

The cause stood continued *nisi* for advisement, and at the succeeding March term at *Boston* the opinion of the court

Sheple, Exr. *vs.* Farnsworth, Executor.

(except the *chief justice*, who did not sit in the cause) was delivered by

SEDGWICK, J. This case presents two points for consideration: the *first* depending on the question, was the legacy given to Mrs. *Sawtell* specific? If it was, then the executors, on a request for that purpose, ought to have exposed the notes and bonds of their testator, that Mrs. *Sawtell* might select from them to the amount of the legacy given to her: and the plaintiff in this case must recover, unless he is concluded by a decision of the *second* point in the case, that is, by having received the average awarded upon the legacy by the order of court.

But as to the nature of the legacy, whether it be general or specific, it is unnecessary in this case to determine: bebause we are all of opinion on the second point; that the receipt by the plaintiff of the average awarded by the order of the supreme court of probate is conclusive against the plaintiff's right to recover.

This was an order of the supreme court, estimating the whole amount of the plaintiff's demand: all the circumstances were known to him: and he acquiesced in the decision which was made. Such an adjustment made of a demand, where there is no imposition or misrepresentation on one side, nor any mistake on the other, it is of importance should be considered as conclusive.

Plaintiff nonsuit.

DANIEL FARWELL

versus

BRADDOCK JACOBS, ADMINISTRATOR.

A direction in a will to the executor, *to support the testator's aged father in sickness and in health*, is a legacy, for which an action lies against the executor by the statute of 1783, c. 24.

The duties of an executor devolve on an administrator *cum testamento annexo*, where the authority is not necessarily connected with a personal trust or confidence reposed in the executor.

THIS was an action of the case to recover damages for not paying a legacy bequeathed to the plaintiff in and by the last will and testament of *Timothy Farwell*, deceased. The dec-

laration states that the testator being seized and possessed of large real and personal estate, made his last will on the 30th of September, 1798, of which he made *Henry Farwell*, his son, executor, and therein, among other things, directed the executor, to support in sickness and in health the testator's aged father, who is the now plaintiff: that the testator afterwards died, and his will was proved, and the trust of executor was accepted by the said *Henry*, who afterwards neglecting to execute the trust, and removing from the state, administration *de bonis non cum testamento annexo* was committed to the defendant: that sufficient assets came to his hands: and that neither he, nor the said executor has maintained or supported the plaintiff: and this action is brought to recover in damages a sum equivalent to the support and maintenance directed in the said will.

The cause was submitted to the court on a case stated by the parties, in which the allegations contained in the declaration are substantially agreeed, and if, in the opinion of the court, the plaintiff could not maintain this action, he was to become nonsuit, and if he can maintain the action, the defendant was to be defaulted.

The cause was argued early in this term by *Bigelow* for the plaintiff, and *Dana* for the defendant.

The opinion of the court was delivered by

PARSONS, C. J. At common law no action lies to recover a legacy, or damage for non-payment of it. The remedyof the legatee is either in the ecclesiastical court or in chancery. Having neither of these courts, by the provincial statute of 5 *Will. & Mar.* c. 3. it was enacted that any certain legacy, or any residuary or uncertain legacy, reduced to a certainty by the executor's account, may be sued for and recovered at the common law. By the statute of 1783, c. 24. in which this part of the provincial statute is revised, it is enacted in general terms, that any person having a legacy given him may sue for and recover the same at common law.

In consequence of these statute provisions, legacies have always been recovered by actions at law, in which the legatee shews the bequest, the probate of the will, the official capacity of the defendant, and his reception of assets making

Farwell vs. Jacobs, admr.

him liable to pay, of which the probate records are evidence; whence an action has accrued by law to the legatee to demand and have the legacy of the defendant, and that he after notice and demand has refused to pay; to the damage of the defendant.

In the present action the defendant is not the executor, but is the administrator of the estate not administered by the executor, with the will annexed; and he is liable in all cases for debts and legacies not paid by the executor, which the executor was liable from his official character to pay. And the general rule is, that the duties of an executor, resulting from the nature of his office, and charged upon him as executor, devolve on an administrator *cum testamento annexo;* where the authority is not necessarily connected with a personal trust or confidence reposed in him by the testator.

What is called in this case a legacy to the plaintiff is a direction to the executor to support and maintain him during his life. This bequest could be enforced by a bill in chancery: but having no chancery here, damages are given at law, to be paid out of the estate of the testator, sufficient to compensate the legatee, for the non-execution of the trust of supporting and maintaining him. In this way justice is done to legatees by suits at law, but it must be admitted, not so conveniently and correctly in many cases, as could be done by a court of equity.

Upon these principles we are of opinion that the present action is maintainable. The direction to support and maintain the plaintiff results from the bounty of the testator declared in his will, and must be considered, as to the remedy, as a legacy. It is made the duty of the executor, in his official character, to furnish this support and maintenance out of the estate of the testator in his hands, of which he had sufficient. He did not discharge his duty, and it has devolved on the defendant, in his character of administrator *de bonis non cum testamento annexo*, who has sufficient assets; and for neglecting this duty the plaintiff is entitled to judgment against the estate in the defendant's hand for a sum of money in damages, which shall be a reasonable compensation for the bounty of the testator, which has been withholden from him. Let the defendant therefore be called.

ISAAC FARNSWORTH, JUN. *versus* DAVID CHILDS.

IN this action, which was trespass *quare clausum fregit*, and which was tried before *the Chief Justice* at the adjourned sittings after the last October term, a verdict was taken for the plaintiff by consent, subject to the opinion of the court upon the following case, *viz.*

"That on the 11th of June, 1805, *John Farnsworth* being seized in fee of the close in which, &c. *bonâ fide*, and for a valuable consideration, by his deed then executed, conveyed the same to the plaintiff for the term of his life: that on the 13th of the same June the said *John* requested *James Brazer*, a justice of the peace, to come to the house where the said *John* and the plaintiff both lived, to take the acknowledgment of a deed: that on the same day the said *James* went to the house and told the said *John*, that being in haste he wished him speedily to bring the deed: that the said *John* then produced the same deed telling the said *James* that, as he had written it himself, he did not know wether it was right, and requested the said *James* to read it: that the said *James* thereupon read it, told the said *John* it would do well enough, and took the acknowledgment of it, which he certified at the bottom of the deed: that owing to the bodily infirmities of the plaintiff, the premises continued to be occupied under the direction and management of the said *John*, but for the plaintiff's use: and that the deed was not recorded until the sitting of this court in October, 1807—That at the court of common pleas for this county in June, 1807, the said *James Brazer* and one *William F. Brazer*, then being partners in trade, recovered judgment for damages and costs against the said *John*, and afterwards extended their execution on the premises as his estate, which execution was legally returned and recorded, and seizin of the premises was delivered to the said *William* for himself and his said partner, he the said *William* never having any knowledge that the said *John* had conveyed the same to the plaintiff as aforesaid: that after said delivery of seizin, and before the suing out of the original writ in this action, the defendant as servant to the said *Wil-*

Though a deed of conveyance be not acknowledged or registered, yet the conveyance shall be good against a second purchaser with notice and such notice may be either express or implied.

Where a second *bonâ fide* purchaser had read a prior deed of conveyance, but the grantee neglected for two years to put it on record, and for personal reasons permitted the grantor to remain in the visible possession and occupation of the land, the first purchaser was held not entitled to relief, & the second purchaser entitled to the land.

Farnsworth vs. Childs.

liam and by his direction, entered into the said close, and cut and carried away the hay mentioned in the plaintiff's declaration.

If on these facts it is the opinion of the court that the verdict ought to stand, judgment is to be entered upon it: if otherwise, the verdict is to be set aside, and a general verdict is to be entered for the defendant, and judgment accordingly."

The cause was continued to this term, when it was argued by *Dana* for the plaintiff, and *Bigelow* for the defendant; and the opinion of the court afterwards delivered by

PARSONS, C. J. Upon this case the plaintiff moves for judgment upon the verdict, because one of the judgment creditors of the grantor well knew, before the execution was levied, that the close had been conveyed to the plaintiff, and the levy was therefore fraudulent, notwithstanding the plaintiff's neglect to record his deed.—On the other side, the defendant moves to set aside the verdict, because there was no evidence that *James Brazer*, the justice, ever knew what lands were conveyed by the deed, his attention having been wholly confined to the tenure created by it, whether it was or was not created by suitable words: that if it must be presumed that *James*, when he took the acknowledgment, knew that the close was conveyed to the plaintiff by the deed, yet as there was no apparent change of possession, the occupation being in fact by the grantor, he might well presume that the conveyance was rescinded by the parties, or the close reconveyed to the grantor, the occupier. But if the conveyance would be deemed good as against *James*, yet it should not affect *William* the other partner, who it is agreed had no knowledge whatever of the conveyance: and as *William* must suffer, if *James* suffers, neither ought to suffer by the laches of the plaintiff.

At common law a freehold estate could not pass but by livery of seizin, that the freeholders of the county might have notice of the conveyance. By a law of the colony of *Massachusetts-Bay* [1641–2] it was ordered that no alienation of any land, where the grantor remains in possession, shall be good against any persons but the grantor and his heirs, unless the deed be acknowledged before some magistrate, and

recorded by the clerk of the county court. Afterwards by another law it was ordered that no alienation of any lands shall be good, unless by deed executed by livery of seizin, unless the deed be acknowledged and recorded. Thus under the old colony laws conveyances of land might be made by deed executed and seizin delivered, or without livery of seizin, if the deed be acknowledged and recorded.

By the provincial statute of 9 *Will.* 3. c. 7. it was enacted that alienations of land by deed acknowledged and registered should be good in law without any other legal ceremony. And that no alienation, unless made in that manner, should be legal, except against the alienor and his heirs. By this act the common law conveyance by deed with livery of seizin mas made void except against the grantor and his heirs.

These provisions were re-enacted by the statute of 1783, c. 37. § 4. now in force. In the construction of this statute it has been held, that although the deed of conveyance be not acknowledged or registered, yet the conveyance to the first purchaser shall be good against a second purchaser, who had notice of the prior conveyance. The registry of a deed was required, to give more general notice of the conveyance than would result from livery of seizin, which was prescribed by the common law for the purpose of notice. But if a second purchaser has in fact notice, the intent of the registry is answered, and to permit him to hold against the first purchaser would be to convert the statute into an engine of fraud, instead of a protection against it.

And it has very reasonbly been determined that notice to the second purchaser may be either express or implied. It is express, when knowledge of the prior conveyance has in fact been communicated to him. It may be implied from circumstance; as when the first purchaser is in possession claiming the land. For the offer by the original grantor to sell land not in his possession, but which is in possession of another claiming it, is sufficient to rouse suspicions of an intended fraud, and to induce an enquiry of the possessor respecting his title.

In the application of these principles in the present case, it is contended by the plaintiff, that one of the judgment credi-

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tors of the grantor had express notice of the prior sale, because he had read the deed of conveyance, although for the purpose only of giving his opinion as to the form of it. It is certainly possible that a man requested to read a deed, to give an opinion whether it is well drawn, may overloook the description of the estate intended to be conveyed, and fix his attention only on the formal parts of the deed, and a jury, from all the circumstances of the case, might infer this to be the fact. But as it is stated that he read the deed, we are bound to consider him as having knowledge of all the contents of the deed, not being at liberty, as a jury is, to make a different inference.

But it is said by the defendant, admitting the creditor once knew the contents of the deed by reading it two years before, that he had no reason to presume that the plaintiff's estate remained in him, as the deed had lain by unrecorded, and there had been no apparent change of possession or occupation. This observation appears to have weight. The creditor's debt was *bonâ fide*, and the lands of the grantor were liable to satisfy it. The grantee does not put his deed on record, and for personal reasons, he permits the visible possession and occupation to remain in the grantor: and no reason is assigned why the deed is not recorded.

The words of the statute are, that a deed not acknowledged and recorded shall not be valid in law to pass the estate, but against the grantor and his heirs. We are willing to construe the words liberally, to guard against fraud, but not to the injury of a second purchaser. If the grantee had entered into possession, the notice of the prior conveyance must have been considered as a continuing notice. But when the grantor remains in possession for a long time, during which the grantee might have recorded his deed, but does not do it; it would be unreasonable to defeat the subsequent title of a judgment creditor by imputing to him a fraud; because he might well presume, from the length of time that the deed had remained unrecorded, either that it was not *bonâ fide*, or that it had been cancelled, or that the estate had been reconveyed; and if the first purchaser suffers, it is owing entirely to his own neglect.

Farnsworth *vs.* Childs.

When express notice of a conveyance, not accompanied or followed by a change of actual possession, is given to any person, and he shall soon after levy his execution upon the estate as the property of the grantor, or take a second conveyance from him, before the grantee has had a reasonable time to put his deed upon record, according to the usage of prudent purchasers, who carry or send their deeds to the registry the first convenient opportunity, we are willing to relieve the first grantee against the rigour of the words of the statute, by imputing fraud to the second purchaser: but we cannot go further against the words of the statute, to protect him from his own laches. If the grantee had taken visible possession of the estate before the levy or the second purchase, the case would rest on different principles, and would receive a different decision.

It is then our opinion that the plaintiff must abide by the letter of the statute, and is not entitled to be relieved against it by any construction of the common law. Consequently the verdict must be set aside, and a general verdict entered for the defendant, on which he may have judgment.

WILLIAM BRIDGE *versus* JOHN FORD, JUN.

In debt upon a recognizance to a party taken before a justice of the peace, conditioned for prosecuting an appeal, it must be shewn that the justice had jurisdiction of the action, and that the recognizance has been entered of record in the common pleas: and the condition must be set forth, and the breach alleged.

THIS was an action of debt brought upon a recognizance taken before a justice of the peace. The declaration contained two counts. The first alleged that the defendant, at a day therein mentioned acknowledged before the justice that he was indebted to the plaintiff in the sum of fifty dollars to be paid on demand; and that an action had accrued to the plaintiff to demand and recover the same. The second count stated that on the same day, before the same justice, the defendant appeared and entered into a recognizance, a copy of which the plaintiff brings into court, wherein and whereby the

Bridge vs. Fo[illegible]

defendant acknowledged himself to be indebted to the plaintiff in another sum of fifty dollars, to be levied upon the goods and chattels, lands and tenements, and in want thereof upon his body, to the use of the plaintiff: and that an action had accrued to the plaintiff to demand and recover the said last mentioned sum: yet though requested, &c.

The defendant prays oyer of the recognizance and of the condition thereof, which latter is "such that if the said *James Bowers*, a minor, shall at the court of common pleas for the county of *Middlesex*, which is to be holden, &c. prosecute with effect and appeal by him made from a judgment obtained against him by the said *William Bridge* at a justice's court, which was holden before me at, &c. on the day and year aforesaid, then the above written recognizance to be void and of no effect; otherwise to abide in full force and virtue."

The defendant then demurs to the declaration, and assigns the following causes of demurrer.

1. That it does not appear by the declaration aforesaid that the judgment appealed from has ever been affirmed by the court of common pleas, or any complaint made by the said *Bridge* to the said court against the said *Bowers*, for not entering his appeal.

2. That it does not appear, by any averment in the said declaration, that there is any record of any such recognizance before the said justice.

3. That the plaintiff having declared upon a supposed debt arising solely upon a recognizance, ought not to have concluded with an averment that "an action has accrued," &c.

The demurrer being joined by the plaintiff, the cause was argued by *Stearns* in support of the demurrer, and *Jos. Locke* for the plaintiff, and the action being continued *nisi* for advisement, the opinion of the court was delivered in *Boston* at the succeeding March term by

PARSONS C. J. We are satisfied that this declaration is bad for several reasons.

1. It does not appear from any part of the record, of which the recognizance is now a part, that the justice had any jurisdiction in the cause therein referred to. We cannot conjec-

ture in what manner the process was instituted, or what was the cause of it,or whether it was a cause within the jurisdiction of a justice of the peace. And we cannot presume any thing in favour of the jurisdiction of an inferior magistrate, as it is not general, but given and limited by particular statutes. In the condition of the recognizance the justice ought to have recited so much of the cause, that it might appear that he had legal cognizance of it. If it were not within his jurisdiction, the proceedings as well as the recognizance are void.

2. The recognizance does not appear to have been delivered to, and entered of record in the common pleas. Debt as well as *scire facias* will lie on a recognizance to a party; but this recognizance must be matter of record, and in debt upon it the defendant may plead *nul tiel record*. Whenever therefore a justice recognizes a party to appear at any court of record, it is his duty to transmit the recognizance to that court, that it may be entered of record.

3. There is a material variation between the declaration and the recognizance; as it appears to be acknowledged on a condition, which is totally omitted in the counts. If this can be got over, as variance is not assigned for cause of demurrer, yet the declaration is substantially bad, for oyer of the recognizance being had, and it being spread on the record, it must now be taken as part of the plaintiff's second count. The debt is then acknowledged on condition, and (unlike the case of a bond *in pais* upon condition) no debt is due, until the condition is broken. But the breach of the condition is no where alleged. In 2 *L. Raym.* 1256. there is a precedent of debt on a recognizance of bail, and many other precedents of the like action are given and referred to in 7 *Wentworth's Pleadings*, 54—88. In all the recognizance is alleged, either to be taken by a court of record, or to be delivered to the court and recorded. In all the condition is set out, and a breach of it alleged. In a recognizance to the party, it may not be necessary that the breach of the condition be a matter of record, as it is when the recognizance is to the commonwealth, who can take only by record. In this latter case it is usual to call a party recognized to ap-

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pear, and to enter his default on the record. But this last point it is unnecessary to decide.

The condition of the recognizance is no part of the first count; but it is clear that an action of debt does not lie on any acknowledgment of a debt taken before a justice of the peace.

It appears to the court that the declaration is bad and in sufficient in law for the plaintiff to maintain this action, and the defendant must have judgment for his costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTY OF ESSEX.

NOVEMBER TERM, 1808.

AT SALEM.

PRESENT

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK,
HON. SAMUEL SEWALL,
HON. ISAAC PARKER,
} JUSTICES.

JOSEPH YORK *versus* NOAH J. NOYES.

THE plaintiff, having regularly appealed from a judgment of the common pleas to this court holden at *Ipswich* on the fourth Tuesday of April last, had by some accident failed to enter his appeal. He now moves the court that he may enter his appeal as of the last term, and that the cause may be brought forward to the docket of the present term, (the defendant here in court consenting to it,) that he may not be driven to his petition provided by the first section of the statute of 1791, c. 17.

The court granted the motion, observing that it might unquestionably be done by consent, so as to bind the parties, but not to prejudice the bail, or affect the rights of subsequent attaching creditors.

Practice.

Where an appellant has failed by accidentto enter his appeal at the last term, the court permitted him to enter it now as of that term, the appellee consenting, and the bail not being prejudiced, nor subsequent attachments affectedthereby.

COMMONWEALTH *versus* JOHN KINISON.

Upon an indictment for having in possession a counterfeit bank note it is not sufficient for witnesses to swear to the identity of the note unless it has been constantly in their possession, or they have put a private artificial mark upon it before parting with it.

THE defendant was indicted for having in his possession a false, forged and counterfeit note of the *Vermont* state bank, with intent to pass the same as true, he well knowing the same to be false, forged and counterfeit, against the form of the statute in such case made and provided, and the peace and dignity of the commonwealth.

Upon the general issue pleaded he was tried during this term before *Sedgwick*, *J.* and was found guilty subject to the opinion of the court on the question proposed in the judge's report, which follows.

"In this case it appeared that the bill exhibited at the trial was out of the hands of *Daniel Pecker*, to whom it was passed, two or three weeks, during which time it was in the hands of a justice of the peace, who might have been, but was not produced upon the trial. *Pecker* and his wife swore positively to the identity of the bill, on which there was no private or artificial mark, but there were three accidental ones. The conviction is right, if the testimony of the justice was not indispensable, otherwise there ought to be a new trial."

It having been agreed by the *solicitor general* and *Story*, of counsel for the prisoner, that the question of law arising on this report might be determined in any county, the opinion of the court was delivered as follows, at the succeeding March term in *Suffolk*, by

PARSONS, *C. J.* We have looked into this case, and on consideration are all of opinion that the verdict must be set aside, and a new trial granted.

It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of a higher in existence, and which may be had, shall not be admitted.

In the present case *Pecker* was an unexceptionable witness to prove that the defendant passed a bank note to him; but when he testified that the bank note he received had been out of his possession, and in the possession of the justice, whose testimony might have been had, it was irregular to admit him to testify to the identity of the note produced from his recol-

lection of accidental marks. The testimony of the justice would have been direct, and is of a superior nature.

If the witness present had, before he parted with the note, made any private artificial mark, which he recognized on producing the note, and to which he could positively swear, we think such testimony ought to have been admitted, as being of as high and satisfactory a nature as the justice's testimony: because it could not be presumed that a *fac simile* of his private artificial mark would be imposed on another note by another person. But any accidental marks on this note might have happened to be on other notes.

In the case of *Williams* vs. *The East India Company* (1) the testimony of witnesses, from which a strong and satisfactory presumption arose, was rejected, because it appeared that there was a witness, who might have been produced, and who could have testified directly to the fact.

The same objection lies to *Pecker's* wife as lies to him and a new trial must be granted.

(1) 3 *East.* 192.

JOHN F. DUMAS *versus* JOHN C. JONES.

CASE upon a policy of insurance dated January 21, 1804, whereby the plaintiff, by his agent *Benjamin Watkins*, caused himself to be insured the sum of 5000 dollars *on the freight* of the brigantine *Rose*, valued at the sum insured, at and from *Jeremie* in *Hispaniola* to *Philadelphia*, for a premium of twelve per cent. The plaintiff declared as for a total loss by capture and condemnation under the authority of the *French* government. There was also a count for money had and received.

Where an insurance is made by one in his own name only, on property valued, and it afterwards appears that the insured was owner but of a moiety; he shall recover but for a moiety of the sum insured in case of a loss.

At the trial which was had before *Sewall, J.* at the sittings after November term, 1806, it appeared that the defendant under wrote 1000 dollars, after other subscriptions to the amount of 2500 dollars.

Whether profits may be insured under the name of freight, *quære.*

Dumas
vs.
Jones.

It was agreed by the parties that the brigantine *Rose* was the joint and equal property of the plaintiff, and one *John W. Foussatt*, *American* citizens; and that her cargo at the time of her capture was the property of the same persons; and that the said vessel and cargo had been captured and wholly lost in the manner averred by the plaintiff in his declaration.

It was in evidence that the brig *Rose* sailed from the port of *Jeremie* bound to *Philadelphia* on the 29th of November, 1803, and was the next day captured by an armed *French Felucca*, and carried into *St. Jago de Cuba*, and with her cargo was there condemned, principally, as appears from the minutes of the court, for having traded with the rebels of *Hispaniola:* that the cost of the cargo on board at the time of the capture was 42,799 dollars; and that the value at *Philadelphia*, had it arrived in safety, would have been 56,110 dollars free of duties; and calculating the profits thereon as freight, the plaintiff's moiety would have been 6,655 dollars.

From a declaration made on oath by the plaintiff before a notary public at *Philadelphia*, which was admitted to be read in evidence, it appeared that the insurance was directed by the plaintiff for the joint account of himself and *Foussatt:* but the letter to *Watkins* authorizing and requesting him to make the insurance, and which was shewn to the broker before the policy was made, does not mention *Foussatt* or any other person but the plaintiff, as interested in vessel or cargo.

Watkins the agent also testified that since the notice of this loss and since it was known that the condemnation was on charges relative to an illicit trade with the brigands, the broker had offered in behalf of the underwriters to pay 2500 dollars upon this policy.

Upon this evidence a verdict was taken, under the direction of the judge, for the defendant upon the first count in the declaration, and for the plaintiff upon the second count, as for a return of premium only, subject to the opinion of the court upon the judge's report: the plaintiff also moving for a new trial.

The cause was argued at the last November term in this county by *Dane* ond *Jackson* for the plaintiff, and *Livermore* for the defendant.

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Jones.

For the plaintiff it was contended that the freight being fairly valued, the valuation is binding on the parties, though it may exceed the actual value. But the facts shew that there was no over valuation in this case. The plaintiff's moiety exceeded the sum insured. The declaration of *Dumas* before the notary, being only explanatory of his own understanding and intention at the time of making the contract, ought not to have been admitted in evidence. To vary a contract from the obvious meaning of its terms, the understanding of both the parties should be shewn, and that of one of them can never with propriety be received. Put that declaration out of the case, and there is not a shadow of objection to the plaintiff's recovering the whole sum underwritten.

If the plaintiff was bound to disclose *Fousatt's* interest, then the concealment was fraudulent, and the plaintiff is uot entitled to a return of the premium. But the verdict disproves this position.

The objection, which was made at the trial, that the plaintiff, being owner of the cargo as well as of the vessel, was entitled to no freight, is contradicted by the uniform understanding, language and practice of merchants and underwriters in this country. Freight is understood here to be that profit which the owner of a ship makes by transporting goods from one country or port to another. If they be the goods of another, the shipowner receives money by way of hire: if they are his own goods, his freight is received in the advanced value of his cargo; this advance in value being directly owing to the transportation.

If the court should be of opinion that the plaintiff has a right to recover but for his own moiety, he had certainly a right to cover the premium he paid, and to do this the defendant must be held to pay 300 dollars of the sum he underwrote.

For the defendant it was insisted that the plaintiff had not shewn an interest sufficient to reach the sum underwritten by the defendant. Profits may be insured *eo nomine*, but there is no case, where by a policy upon the freight of a ship, the profits of the cargo have been held to be insured. Freight is *the money paid* by the owner of goods to the owner of a ship

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for transporting them. Where the two characters of owner of the ship and owner of the goods unite in the same person, no money can be paid or received, and none can therefore be lost. Freight is perfectly understood from the books, and all writers on the marine law agree in its definition. There is no need then of recurring to merchants or underwriters for an explanation of a term, which has already acquired a definite meaning in common use.

The declaration of the plaintiff was not introduced to explain or contradict the policy, but to shew a material fact *viz.* the plaintiff's share or interest in the subject of the insurance. And it remains for the court to say that he shall recover the whole amount of the freight intended to be covered by this policy, when he has on oath declared that he owned but a moiety of it.

The defendant's counsel argued also from the evidence in the case, that the condemnation by the French court was for a breach of the laws of the country, and that therefore the underwriters were not held. But as the decision does not rest on this ground, it is unnecessary to recite those arguments.

The action stood continued for advisement, and now the opinion of the court, *viz. Sedgwick*, *Sewall* and *Parker*, justices, was delivered by

PARKER, J. This action is brought to recover the sum subscribed by the defendant on a policy of insurance, whereby the sum of 5000 dollars was insured, on the freight of the brig *Rose*, for the plaintiff alone, at and from *Hispaniola* to *Philadelphia*. The defendant underwrote 1000 dollars, after five other underwriters had subscribed the sum of 2500 dollars. The freight is valued in the policy at 5000 dollars. The vessel and freight were totally lost by means of a capture by a French privateer, and a consequent condemnation: and the plaintiff must recover, if he had an insurable interest not covered by the subscriptions antecedent to that of the defendant. Whether he had or not must be determined by the facts reported by the judge, and the documents referred to by him in his report.

It is agreed by the parties that the plaintiff and one *Foussatt* were the joint and equal owners of the brig and of all the

cargo on board ; and it appears that the profits on the cargo, had it been safely landed at the port of destination, would have exceeded the sum, at which the freight was valued, so that the valuation in the policy was not unreasonable or excessive. And if upon this policy the plaintiff can avail himself of the interest of his partner, as the profits of the voyage may be insured under the denomination of freight, he would entitle himself to recover the sum subscribed by the defendant.

But it is objected that the plaintiff's interest alone is insured, no representation having been made to the underwriters that he had any partner ; and the contract being made with him, and upon his sole account, so that it is not competent for him to recover beyond the value of his own interest in the freight insured. And this seems clearly to be the law as well in this country as in *England ;* and it is founded on just principles.

The insured has a right to know for whom, as well as with whom he contracts, his calculations depending not unfrequently on a knowledge of the characters of those whom he undertakes to indemnify. If the insured acts as agent for others, he should make known the relation in which he stands, and the policy should express, or at least the underwriter should be made to know, the interest of all the persons, in whose favour his contract is to operate.

In this case the freight is valued at 5000 dollars. This must be taken to be the whole freight supposed to be earned on the voyage insured ; for the plaintiff does not communicate to the underwriter any circumstance, which could justify another opinion ; but speaks and acts in the contract, as if he was the sole owner of the vessel and freight.

If however there were any doubt whether the sum, at which the freight was valued, was an estimation of the whole, or only of the moiety, which belonged to the plaintiff, that doubt is wholly removed by the declaration of the plaintiff himself, made under oath before a notary public in *Philadelphia*, wherein he expressly states that the insurance of 5000 dollars, made by his agent *Watkins*, was on the joint account of himself and partner. This declaration we think was properly admitted

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in evidence, it being the confession of the party under the solemnity of an oath.

It results then that the sum at which the freight was valued in the policy, was considered by the plaintiff as the whole freight of the brig *Rose*; that he was the owner of but one half of that freight, and that his interest was entirely insured by the underwriters, who preceded the defendant on the policy. It is therefore clear by the terms of the policy that nothing can be recovered of the defendant, if the law will not suffer the plaintiff to recover on account of the interest which his partner had in the freight; and that it will not, is clear from the principles before stated, as well as from decisions of high authority.

In the case of *Graves & al.* vs. *The Boston Marine Insurance Company*(1), the point was precisely brought before the supreme court of the *United States* on a bill in equity, praying for relief against a supposed mistake in not inserting the name of one of the partners in a policy procured by the other. It was in that case expressly decided that the interest of a partner not named in the policy cannot be proved in order to make out the whole sum insured by the other partner, no partnership being recognized in the policy; and the principle was adhered to in all the attempts which were made to recover the value of the interest of the company.

This decision being had by the highest judicial tribunal, upon a subject, on which it is desirable there should be an uniformity throughout the *United States*, this court would not be disposed lightly to question it.

We are therefore of opinion that the verdict was right, against the plaintiff on the first count, and in his favour on the second for return of premium, and judgment will be entered accordingly.

Sedgwick, *J.* in concurring with the foregoing decision, observed that all the court were not agreed in the position that profits are insured under the term freight: and that the question of the validity of the condemnation had not been considered by the court.

The chief justice having been of counsel for the plaintiff, did not sit in the hearing and decision of this cause.

(1) 2 *Cranch.* 419.

JOHN EMERTON *versus* NATHANIEL ANDREWS.

THIS action in *assumpsit* for a sum of money due for the board of several workmen while in the service of the defendant, and for some small articles sold and delivered, was tried at the sittings after the last November term in this county, before *Sewall, J.* upon the general issue.

A. being in the service of B. and having engaged to pay his own board, applied to C. to board him, and proposed to him to take his pay in goods out of B.'s store, to which B. consented, and promised he should be so paid: in an action by C. against B. for the board of A. this latter was offered as a witness for the plaintiff, and these facts coming out on examining A. on the *voir dire*, he was rejected as interested in the event of the suit.

At the trial the plaintiff reduced his demand to the charges for the board of *Christopher Beals*, and for the articles sold. *Beals* being produced as a witness and objected to, was sworn on the *voir dire*. On his examination he declared that having engaged to work for the defendant, he was to pay for his own board: that on the defendant's advising him to board in town, he, *Beals*, requested the plaintiff to board him and take his pay *in goods* at the defendant's store. This the plaintiff agreed to, and on proposing it to the defendant he consented, and verbally promised the plaintiff that he should be paid in that manner for *Beals'* board: that he then boarded with the plaintiff, and was considered by him as likewise answerable for the payment of his borad. On this examination the judge rejected *Beals* as interested, and therefore incompetent to charge *Andrews* in this action. The other charges being admitted by the defendant, a erdict was taken for the amount of them only; subject to the opinion of the court, whether *Beals* was a competent witness, and whether the facts thus disclosed by him on the *voir dire*, if proved by parole testimony only, would support this action.

The cause stood continued to this term, and now *Story*, for the plaintiff, contended that the witness ought only to have been enquired of generally on his *voir dire* whether he was interested in the suit, and expected to gain or lose by the event of it; and if he answered this enquiry satisfactorily, should have been sworn in chief, in which case his testimony would have gone to the jury, and might have been sufficient to support the plaintiff's demand. If it be said that the witness disclosed all the facts that could have come out, if he had been sworn in chief, the objection remains that the jury were not permitted to decide upon his testimony.

Emerton *vs.* Andrews.

By the court. We are satisfied that the rejection of the witness in this case was right. If the plaintiff, who produced *Beals*, prevailed, then *Beals* would be discharged from any demand for his board by the plaintiff: and in an action brought against him by the plaintiff for his board he might give in evidence the judgment on the verdict in this cause, and satisfaction of it, to defeat the action. But if *Beals* was not interested, it would have been useless to the plaintiff to have sworn him: for laying the statute of frauds out of the question, his testimony would have proved, if any thing, a special contract made by the defendant with the plaintiff to pay for the witness's board in goods, which testimony would have disproved the contract on which the action was brought.

Judgment must be entered on the verdict.

Putnam for the defendant.

ROBERT MITCHEL, *PER PROCHEIN AMI*,

versus

ENOCH LUNT.

A creditor of an intestate having recovered judgment against an executor *de son tort*, cannot levy his execution issued upon such judgment upon the lands of which the intestate died seized.

THIS was a writ of entry *sur disseizin*, "wherein the said *Robert*, an infant, who sues this action by *W. B.* his next friend, demands against the said *Enoch* a certain tenement and land described, with the appurtenances: whereupon the said *Robert* by his said next friend complains and says that *Robert Mitchel*, father to the demandant, was seized of the demanded premises within thirty years last past, in his demesne as of fee and right, taking the profits thereof to the value of one hundred dollars by the year, and that the said *Enoch*, within the time aforesaid, and in the lifetime of the said *Robert* the father, unjustly and without judgment of law, disseized him of the tenement aforesaid, with the appurtenances thereof; and that the right to the same afterwards descended from him to the demandant, his son and heir, and the said *Enoch* still deforceth the said *Robert*, the son, of the tenement aforesaid. To the damage," &c.

The cause was tried upon the general issue pleaded and joined, before *Sewall, J.* at the last April term at *Ipswich*, and a verdict found for the tenant, *viz.* that he never disseized *Robert Mitchel*, father of the demandant, as set forth in the declaration.

The verdict was taken by consent, subject to the opinion of the court upon the following facts.

"That *Joshua Mitchel*, the grandfather of the demandant, in the year 1780, died seized of the tenements demanded in fee simple; that on his death the same descended to *Robert Mitchel* aforesaid, his son, who thereupon entered and was seized thereof, as the law requires: that afterwards at a court of common pleas holden in September, 1784, the tenant recovered judgment against *Elizabeth Mitchel*, widow of the said *Joshua* the grandfather, as executrix of his last will, for the sum of 27*l.* 0*s.* 10*d.* damages and 3*l.* 3*s.* 6*d.* costs of suit: that afterwards on the 30th day of May, 1785, execution on the said judgment issued against the goods, chattels and lands of the said *Joshua* the grandfather, in the hands of the said *Elizabeth*, and on the sixth day of July, 1785, was levied in due form of law on the demanded tenements, and seizin thereof given to the tenant, which execution was duly returned and registered: that the tenant has continued seized ever since the levy of the said execution: that the said *Robert* continued seized until the said levy: that he has since within twenty years died, leaving the demandant his son and heir: that the said *Joshua*, the grandfather, died intestate, no administration on his estate having been granted: and that the judgment aforesaid, recovered against the said *Elizabeth* his widow, was legally recovered against her as she was executrix in her own wrong of the will of her said husband."

If upon these facts the court should be of opinion that the verdict is right, then it was agreed that judgment should be rendered accordingly: otherwise the verdict was to be set aside, and a verdict entered, that the said *Enoch* did disseize the said *Robert* in manner and form as the demandant has declared, and upon such verdict so entered judgment be rendered for the demandant.

Mitchel
vs.
Lunt.

And now at this term, the court inclining first to hear the counsel for the tenant, *Putnam* observed that it was very clear that the personal estate of an intestate may be taken and sold upon an execution against his executor *de son tort;* and he contended that by our statutes making the lands of persons deceased liable for the payment of their debts, the real estate was placed on the same footing with the personal estate in this respect. At common law the lands of one deceased cannot be taken on execution against a rightful executor or administrator: but by our statute of 1783, c. 32. § 7. the real estate of any testator or intestate is made liable to be levied upon by any execution issuing upon judgments against executors or administrators, being the proper debts of the testator or intestate, in the same manner as by law is provided respecting other real estates levied upon, and may be redeemed by the executor, administrator or heir, in like time and manner. And no reason appears why lands may not be taken upon an execution against an executor *de son tort* as well as chattels.

Sedgwick, J. To subject lands to be taken in such case would open a great door for fraud. Whenever a person saw fit to intermeddle with the estate of an intestate, he might cause the heirs at law to be stripped of their inheritance.

Putnam. Fraud would vitiate any transaction; but it is never to be presumed. In this case every thing must be supposed to be fair and proper. The judgment, on which the execution issued, was regularly obtained, and it must be taken for granted that it was for a just debt due from the intestate. The provision of the statute, that the heirs may redeem the estate taken, is a sufficient protection for them.

But the same objection would apply to chattels as strongly as to lands. As much fraud may be practised, and as much injury committed in one case as in the other: for any one might, by intermeddling with the estate of an intestate, consisting wholly of chattels, defraud those entitled to distribution of the whole of it. But this is in no case to be presumed.

Prescott for the demandant. Though an executor *de son tort*, if he have paid the just debts of the intestate, will be allowed by way of offset, in an action against him by the rightful executor or administrator, so much as the latter would

have been obliged to pay; yet he cannot convey the personal chattels of the intestate, so that the purchaser shall hold them against the rightful executor or administrator. If this were not the case, an insolvent man by possessing himself of the goods of one deceased might dispose of them, and the creditors would be deprived of the remedy for the recovery of their demands.

But we contend that an executor *de son tort* has no connection at all with the real estate of the intestate. This descends to the heir on the death of the ancestor, and even a rightful administrator has no right to enter upon it, except on having obtained a license to sell it for the payment of the debts of the deceased. An executor *de son tort* could certainly never obtain such license.

The provision of the statute of 1783, c. 32. authorizing the extent of executions against executors and administrators upon the lands of a deceased testator or intestate has been cited, and it has been argued that this provision may extend to the case of executors *de son tort*. Although the real estate of deceased debtors was made liable for the payment of their debts as early as the year 1696(1), it was not until the year 1759(2), that creditors were authorized to levy their executions on it. During that period then, it must be agreed a creditor could not avail himself of such real estate in satisfaction of an execution he had obtained against an executor *de son tort*. And the statutes of 1759 and 1783 must, according to all rules of interpretation, be understood as intending judgments against *rightful* executors and administrators. The same executors and administrators are authorized by the statute last mentioned to sell the real estate of the deceased when it shall be necessary for the payment of debts, &c. on obtaining license from the proper court: but it was never heard that an executor *de son tort* obtained such license. So neither will a judgment against him authorize the extent of an execution on such real estate.

The opinion of the court was delivered by

(1) 2. *Mass. Laws, app.* 982.
(2) *Ibid.* 1013.

Mitchel vs. Lunt.

PARSONS, C. J. The demandant, in a writ of entry *sur disseizin*, counts on the seizin of his father of the tenements demanded within thirty years, and of a disseizin done to him by the tenant. The cause was tried on the general issue and a verdict was found for the tenant by the consent of the parties, subject to the opinion of the court upon a case reserved.

Without detailing all the facts agreed, it is sufficient to observe, that the merits of the cause depend on the question whether a judgment, recovered by a creditor of an intestate against an executor *de son tort*, can be satisfied by levying an execution issued on that judgment upon the lands which were the intestate's, but have descended, and of which the heir is in possession.

By our laws the lands of the debtor are made liable for the payment of debts, and may be taken on execution, either in the hands of the debtor, or after his decease in the hands of his executor or administrator. But after the debtor's decease the lands are made liable in aid of the personal estate, which must first be applied to the payment of the debts as far as it is sufficient. And when deficient, the executor or administrator may obtain license for the sale of enough to make up the deficiency. Or if they are not sold on a license duly obtained, the creditor may take them by execution in satisfaction of his judgment. And if by the fault of the executor or administrator, in not collecting the personal estate, or in not applying it to pay the debts, the lands are taken from a devisee or heir, the executor or administrator is liable in an action for waste to the devisee or heir, who is injured by the waste.

An executor *de son tort* has no legal controul over the personal estate; he has no authority to collect the effects of the deceased. His intermeddling is an unlawful act, by which he is liable to a creditor, so far as he has intermeddled: or if when sued, he falsely deny that he is executor he is made chargeable by his false plea for the debt out of his own estate, if he has not personal estate of the deceased sufficient to pay it. But no action lies against him for waste by subjecting the real estate to be taken in execution, for

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not paying the debts of the deceased. And no intermeddling with the lands of the deceased will charge him as executor, but such intermeddling is a wrong done to the heir or devisee.

From this short view of the character, authority and liability of an executor *de son tort*, and of our laws making lands liable for the payment of debts, we are satisfied that the lands of one deceased are not liable to be taken to satisfy a judgment recovered against an executor *de son tort*: that having no character by which he can obtain license to sell lands for the payment of debts, the lands cannot in legal construction be estate of the deceased in his hands: and that to admit the lands to be taken to satisfy a judgment recovered against him would be extremely mischievous, as no action for waste in not collecting the personal estate, and paying the debts, will lie against him for a devisee or heir, who may consequently be unjustly deprived of their lands without an adequate remedy.

The levy, in the case before us, by the tenant on the lands of the demandant's father, who was lawfully seized of them, was an entry unjustly and without judgment of law, and amounted to the disseizin complained of. Pursuant to the agreement of the parties, the verdict must be set aside, and a general verdict for the demandant be entered, and judgment be rendered upon it for him to recover his seizin with costs.

It may be proper to remark, that in cases like the present, where a creditor would avail himself of the lands of an intestate for the payment of his debts, if the next of kin refuse administration, as a creditor he is entitled to it, and in this character, on a deficiency of personal assets, he may have a license to sell land enough to pay his own debt.

ANNA HAINES *versus* EPHRAIM CORLISS, JUN.

If a feme sole plaintiff intermarry pending the action, the defendant pleading this matter in abatement shall recover his costs

THIS was an action brought by the plaintiff, then a feme sole, against the defendant for driving his cart against the plaintiff's chaise. At April term, 1807, the defendant filed a plea in abatement, that since the last continuance the plaintiff

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had intermarried with one *Evan Merrill*, and prayed judgment if she ought to be answered to her writ, and for his costs.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

At the last November term the plea being read to the court, the counsel for the plaintiff agreed that her writ must abate, but questioned the propriety of rendering judgment against her for costs. The action was continued to this term and now

By the Court. It was very properly admitted by the plaintiff's counsel, that her marriage pending her suit gave the defendant matter to abate her writ ; and as he has regularly taken advantage of this matter by his plea in abatement, that the writ must abate.

But the principal question arising in the cause is, whether the defendant can have judgment for costs. By the *English* practice the defendant could not have costs, nor can a plaintiff, on obtaining an interlocutory judgment, that the defendant's plea in abatement is bad, and that he answer further, have costs against the defendant. But by our laws the party prevailing is, in all cases, entitled to costs ; and when the defendant has by plea abated the plaintiff's writ, he has always been considered as prevailing in the cause, and so entitled to costs. And certainly the defendant ought to be indemnified, so far as to have costs, for being exposed to vexation and expense in being obliged to appear and answer to a bad writ. But costs are never allowed to a plaintiff upon a *respondeas ouster*, for he has not yet prevailed in the action, and on his prevailing he will have his costs.

It is objected that the present case must be an exception, because a judgment for costs will affect the interest of the husband, who is not a party to the suit. An execution on a judgment for costs against *Anna Haines* cannot be levied on the goods of her husband, nor can his body be taken, although the wife may be arrested and imprisoned, if the husband will not satisfy the execution.

And this case cannot be distinguished in principle from other cases, where judgment has been recovered against the wife before marriage, and execution issues after, or where the defendant will not plead the intermarriage in abatement, and

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shall afterwards recover costs on the merits. If instead of an execution on the judgment, the party recovering costs shall sue a *scire facias*, or bring debt against the husband and wife, he must have judgment; for the husband cannot enquire into the merits of the former judgment: so on the other hand, if the judgment against the wife be erroneous, the husband may bring error, suing it in his own and his wife's name, to reverse it. As the husband, when he marries, has the property of the wife with her, so he is liable for her debts, if judgment be rendered during the coverture. And if she has sued an action, which is pending at the marriage, he makes himself liable to the legal consequences of the marriage, whether costs be recovered against the wife on abating her writ, or on a judgment against her on the merits.

Let the writ be abated, with costs for the defendant.

Prescott for the plaintiff.

Putnam for the defendant.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE PORTLAND BANK

versus

BENJAMIN STACEY AND WILLIAM MANSFIELD.

REPLEVIN of the schooner *Ann* and appurtenances, also of one hundred and thirty five bales of cotton, fifty-nine tierces and twenty two half tierces of rice.

A *bona fide* conveyance by deed, of a vessel and cargo abroad at the time, is valid against creditors; provided the vendee takes possession thereof without delay upon the return of the vessel.

The defendants pleaded severally the general issue of *non cepit* as to the schooner, which was joined by the plaintiff; and as to the residue of the goods, they plead in bar of the action, that the property thereof was in *Joseph M'Lellan* and *Hugh M'Lellan*, and they justify the taking, as deputy sheriffs, under several writs of attachment against the said *Joseph* and *Hugh* in favour of sundry of their creditors. The plaintiffs reply property in themselves, on which issue is also joined.

There is no difference in effect between the *grand bill of sale* used in *England*, and the bills of sale used in this country for the conveyance of vessels.

Upon trial of the several issues at the last April term, at *Ipswich*, before *the chief justice*, a verdict was returned for

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the plaintiffs, and nominal damages assessed, subject to the opinion of the court on the following facts; *viz.* "That *Joseph M'Lellan* and *Hugh M'Lellan* mentioned in the pleadings were on the 26th of December, 1807, holden and in law bound to pay the plaintiffs the sum of 30,334 dollars 50 cents: that to secure the payment of that sum to the plaintiffs, the said *Joseph* and *Hugh*, by their bill of sale under their hands and seals of that date, bargained and sold, among other property, the schooner *Ann*, mentioned in the writ, with her appurtenances, and also the cargo, if any, which might be shipped on board the said schooner for and on account of the said *Joseph* and *Hugh*, to consist of cotton and rice, which said deed was on condition to secure to the plaintiffs the payment of the money due to them as aforesaid, and was in due form of law: that when the said deed was made, the said schooner was in *Charleston*, *South Carolina*, having two days before taken on board, for and on account of the said *Joseph* and *Hugh*, a cargo consisting of the cotton and rice mentioned in the writ: that the said schooner arrived at *Gloucester* in the county of *Essex*, on the 4th of January, 1808, when her said cargo was attached in due form of law by the defendants at the suits of the attaching creditors named in the pleadings, who are *bonâ fide* creditors of the said *Joseph* and *Hugh*, having no knowledge of the conveyance aforesaid: that the plaintiffs, as soon as they had knowledge of the arrival of the said schooner and cargo, took possession of the same without any negligence on their part, *viz.* on the 18th of January, 1808: and that no other conveyance was executed, instrument made, or act done by the said *Joseph* and *Hugh*, to transfer the property of the said schooner and cargo to the plaintiffs, excepting the executing the bill of sale aforesaid."

If on these facts the court should be of opinion that the property of the said cotton and rice was, when the writ of replevin was executed, in the plaintiffs, then it was agreed that the verdict should stand, and judgment be rendered thereupon: otherwise the verdict as to the said issues should be set aside, and a verdict entered for the defendants on the said issues with one dollar damages.

The cause was submitted without argument and the opinion of the court was delivered by

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PARSONS, C. J. On the trial of the issues the question submitted to the jury was, whether the chattels replevied were the property of the plaintiffs. A verdict being found by consent of the parties for the plaintiffs, subject to the opinion of the court on a case stated, we have examined the facts agreed upon, and upon consideration are satisfied that the verdict is right. The property being in *Joseph* and *Hugh M'Lellan*, they mortgaged it by a deed in due form, duly executed, and for a valuable consideration, to the plaintiffs.

But it is objected that the goods, when the deed was executed, were in *South Carolina*, and that the plaintiffs did not in fact take possession of them, until after they had been attached at the suit of certain creditors of the *M'Lellans*.

Personal property passes by grant on the execution of the deed, and at common law an actual delivery is not necessary to the validity of the grant. By the *English* statute of 21. *Jac.* c. 19. which forms a part of their bankrupt system, a grant, where the possession is not delivered, but remains in the grantor, will not protect the property against the assignee of the grantor, if he become bankrupt. But the *English* bankrupt laws were never in force in this state. By the construction of that statute, a sale of a ship and cargo abroad is good, although possession be not immediately delivered, provided the evidence of the title be delivered, and the vendee take possession as soon as the property is within his reach. In this state the neglect of delivery may be a circumstance, from which a jury may with other circumstances presume fraud; but the sale is not thereby void. Now the schooner in this case arrived at *Gloucester* on the 4th of January, 1808, and it is agreed that the plaintiffs took possession of her and her cargo as soon as they had knowledge of her arrival. Here was therefore no delay in the plaintiffs, nor any circumstance, from which it might be inferred that the sale was not *bonâ fide*. The mortgage must be deemed to have legally vested the property in the plaintiffs, and judgment is to be rendered on the verdict.

The solicitor general and *Prescott* for the plaintiffs.

Dexter and *Jackson* for the defendants.

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Note. After the *chief justice* had delivered the opinion of the court as above, he observed that one reason, which induced him to save this case, was that it might be ascertained whether there was any distinction between what is commonly called the *grand bill of sale* in *England* which is necessary to pass ships at sea, and the bills of sale for vessels used in this country. He said he knew no distinction, and believed there was none. He thought on the whole that the case was so plain, as to have been hardly worth reserving.

PHILIP COTEL, JUN. *versus* NATHANIEL G. HILLIARD.

The penalty provided in the second section of the act of congress *for the government and regulation of seamen in the merchant's service* is incurred by a desertion previous to the commencement of the voyage: and *that* provided in the fifth section of the act by a desertion after the commencement and during the continuance of the voyage.

IN this action, which was *trover* for certain chattels mentioned in the plaintiff's declaration, the parties agreed upon a state of facts, from which it appears that on the 12th of March, 1806, the plaintiff signed a shipping paper in the common form to serve as a mariner on board the brig *Fox*, whereof the defendant was master, on a voyage from *Salem* to *Machias*, and from thence to *Turk's Island* and back to the *United States*; and on the same shipping paper subscribed a memorandum engaging to render himself on board said brig on the same day to go the voyage aforesaid, and afterwards on the same day did so render himself on board: that the said brig was of 116 tons burthen, and the defendant, a mate, two seamen besides the plaintiff and the cook, constituted the crew, which it was agreed were sufficient for the voyage: that the plaintiff received ten dollars at the time of signing the shipping paper as advance wages: that on the 15th of said March, and before the vessel sailed on said voyage, the plaintiff obtained license from the defendant to go on shore from said brig then lying at *Salem*, with orders to return on board the same night: that he went on shore accordingly, but did not return on board at any time afterwards, but refused so to do, and wholly deserted and escaped from said brig, alleging as a reason therefor that the vessel was insufficiently manned: that the defendant then offered to ship another man at *Machias*: that the brig pro-

ceeded to sea on said voyage without the plaintiff, and his absence and desertion were duly noted in the log-book: that at the time of the desertion aforesaid the plaintiff had the chattels aforesaid on board the said brig, in possession of the defendant, and before the commencement of this action they were demanded by the plaintiff of the defendant, who refused to deliver them, claiming them as forfeited by reason of the desertion aforesaid.

Upon these facts it was agreed that if in the opinion of the court the plaintiff is entitled to recover in this action, his damages should be assessed by a jury: otherwise that the defendant should recover his costs.

The cause was shortly argued at the last November term in this county by *Putnam* for the plaintiff, and *Story* for the defendant.

Putnam contended that although this case might come within the *second* section of the act of the *United States*, "for the government and regulation of seamen in the merchants service,"(1), which provides that any seaman neglecting to render himself on board the vessel, for which he has shipped, at the time agreed on, or having so rendered himself shall aftowards desert, so that the vessel proceed to sea without him, shall forfeit certain sums of money therein mentioned: yet it was by no means within the provision of the *fifth* section of the act, which in addition to certain pecuniary penalties specified, imposes a forfeiture of all the seaman's goods and chattels on board the vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners. This latter section he insisted applied only to a desertion in a foreign port. It is very clear that the legislature contemplated two distinct offences, and applied penalties of very different degrees of severity to them respectively, the provision first cited was intended to prevent or punish a desertion in the port of shipping, where the vessel is usually owned and laden, and where the hazard and inconvenience to the concerned would be vastly less than might arise from the same misconduct in a foreign port to

(1) *U. S. Laws, Vol.* 1. 134.

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prevent or punish which was the object of the *fifth* section. The reasoning in the case of *Frontine* vs. *Frost*(2), is applicable to the case at bar, and goes strongly to confirm the position that the legislature could not intend to provide two distinct punishments for the same offence in two separate sections of the same statute. If the plaintiff's case is within the second section, as the defendant must contend it to be, it is absurd to bring it also within the fifth section. These provisions being highly penal, the court will incline to construe them strictly, rather than to extend them by a construction, which is at least unnecessary.

Story argued that the provisions of the two sections were cumulative, and as the offence contemplated was extremely hazardous to the interests of shipowners, the legislature intended if possible to furnish a mean of punishing it. In many cases the forfeiture of the seaman's goods is all the satisfaction that can be obtained. He may and most frequently does take himself out of the reach of process, by which the pecuniary penalties are to be obtained. As the case at bar is within the words of the fifth section, there seems no reason why the plaintiff should not suffer the consequences thereby attached to his offence, one of which is the forfeiture of these chattels to the owner of the vessel, as agent for whom the defendant holds and claims them.

The action stood continued for advisement, and at this term the opinion of the court was delivered as follows by

SEDGWICK, J. It being agreed that the goods, for the conversion of which this action is brought, did once belong to the plaintiff, and that upona demand by him the defendant refused to deliver them, there is no doubt of the conversion; and the only question is, whether the defendant is authorized by law to detain the goods as forfeited, for the cause alleged by him. The solution of this question depends on the construction of the act of congress of the 20th of July 1790.

By the *first* section masters and commanders of ships or vessels in foreign trade, and in the coasting trade if the vessel be of the burthen of fifty tons, are to provide shipping papers written or printed, to be signed by the mariners, declaring the

(2) 3 *Bos. & Pul.* 302.

voyage or voyages, term or terms of time, for which they shall be shipped.

The second section of the act determines what a mariner shall forfeit for neglecting *for a time* or *wholly* to render himself on board according to his contract, or for deserting or escaping, after having rendered himself on board, "so that the ship or vessel proceed to sea without him."

It is observable that these forfeitures are incurred for neglect or breach of duty in cases, which can happen only prior to the commencement of the voyage: as a neglect of the mariner to *render himself on board* according to his agreement, or deserting, *after having rendered himself on board*, "so that the ship or vessel proceed to sea without him."

There is another kind of delinquency, not provided for by the second section of the act, *viz.* a mariner's absenting himself from on board a ship or vessel, on board which he has shipped himself, without the leave of his commanding officer, after the commencement of the voyage. This case is provided for by the fifth section of the statute, by which it is enacted "that if any seaman or mariner, who shall have "subscribed such contract as is herein before described, "shall absent himself from on board the ship or vessel, in "which he shall so have shipped, without the leave of the "master or officer commanding on board; and the mate, "or other officer having the command of the log-book, shall "make an entry therein of the name of such seaman or mar-"iner, on the day on which he shall so absent himself, and "if such seaman or mariner shall return to his duty within "forty eight hours, such seaman or mariner shall forfeit "three days pay for every day he shall so absent himself, "to be deducted out of his wages: but if any seaman or "mariner shall absent himself for more than forty eight "hours at one time, he shall forfeit all the wages due to him, "*and all his goods and chattels which were on board the* "*said ship or vessel, &c.* at the time of his desertion, to "the use of the owners."

To suppose that the forfeiture expressed in the fifth section includes a desertion before the commencement of the voyage, the case which is provided for in the second section, and which was in fact the case under consideration, is to sup-

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pose that the legislature in the same act has provided two distinct and unequal forfeitures for the same delinquency; which would not be respectful to those, by whom the act was passed. We are therefore of opinion that the second section intended the forfeiture expressed in it for conduct previous to the commencement of the voyage; and that in the fifth section was intended such conduct of the seaman as should happen after the commencement, and during the continuance of the voyage.

This opinion is fortified by the consideration that by the fifth section all the wages due at the time of the desertion, when upon this construction it is to be presumed wages would be due, are forfeited: while in the second section there is no provision for the forfeiture of wages, because the case contemplated being before the commencement of the voyage, very little, if any, wages can be supposed to be then due.

The result of this opinion is that the defendant had no right to detain the goods of the plaintiff, and of course that the plaintiff is entitled to recover.

LEONARD SMITH AND OTHERS

versus

THE NEWBURYPORT MAINE INSURANCE COMPANY.

Of the reasonable time after receiving intelligence of a loss, within which the insured must abandon, to entitle him to recover for a tot. l loss.

CASE upon a policy of insurance, in which the plaintiffs caused themselves to be insured the sum of ten thousand dollars on the cargo of the ship *Hunter*, from *Newburyport* to the *Isle of France*, and any ports or places in the *East Indies* or elsewhere beyond the *Cape of Good Hope*, and at and from them or either of them to her port of discharge in the *United States*. The plaintiffs declare upon a total loss by the force and violence of the winds and waves.

Upon the trial of this cause at the last April term at *Ipswich* before *Sewall, J.* a verdict was found for the plaintiffs as for a total loss, subject to the opinion of the court upon a case stated by the parties, in which it was agreed that if the court should be of opinion that the plaintiffs were entitled to recover

for a total loss, the verdict should stand, and judgment be entered upon it: otherwise the damages as for a partial loss were to be assessed and reported by commissioners to be appointed by the court or named by the parties, and the verdict to be altered so as to conform to such report and judgment accordingly.

The ship arrived with her cargo at the *Cape of Good Hope*, and there the supercargo sold nearly half the cargo, and was intending to proceed with the ship and the remainder of the cargo to the *Isle of France*, when a storm drove the ship on shore where she was totally lost, a part of the remaining cargo damaged, and by that event the voyage was wholly broken up and lost. The plaintiffs received accounts of the loss by letters from the supercargo on the 21st of January, 1806, and further particulars of it on the 9th and 10th of February following, and on the 24th of the same February they received a full and distinct account of the nature and extent of it, with the necessary documents to prove it. The plaintiffs lived in the town of *Newburyport*, where the office of the defendants is kept, and the offer to abandon was made on the 10th of April following, which the defendants refused to accept; and the only question made was whether the offer to abandon was made in such season as to bind the defendants.

Prescott, for the plaintiffs, said he was not aware that any precise period had been fixed, within which the insured was bound to abandon. In the present case the plaintiffs had no stronger inducement to abandon when they did it, than when they received the accounts of the loss. In the case of *Livermore* against these same defendants(1), where the party had waited more than a month after notice of the loss before he abandoned, intelligence of a peace in *Europe* was received, a circumstance which appeared to have considerable weight with the court in determining that he had lain by too long. The cases of *Mitchell* vs. *Edie*(2) and *Allwood* vs. *Henkell*(3) were also referred to, as shewing that no definite period was fixed by the law within which the assured was bound to make his election to abandon.

(1) *Ante Vol.* 1. 264.
(2) *Marsh.* 509.
(3) *Ibid.* 512.

Smith & al. *vs.* Newburyport Mar. Ins. Company.

Jackson, of counsel for the defendants, was stopped by the court.

PARSONS, C. J. observed, after stating the facts agreed, that the question reserved was simply whether the plaintiffs had, or had not seasonably abandoned after the knowledge of the peril, so as to entitle them to recover a total loss. They had notice of the loss, and of the nature and extent of it on the 24th of February : they lived in the town where the defendants kept their office, but did not offer to abandon until forty five days after notice of the loss was received, and no reason is assigned for the delay.

The owner must abandon within a reasonable time after notice. He shall not delay for the purposes of speculation, or wait for further intelligence to guide him in his speculations. What is a reasonable time must depend on facts. When the facts are agreed or found, it is a question of law. In the case at bar the offer to abandon was delayed until the 10th of April. This delay unaccounted for is unreasonable, and the court are all of opinion, that in not offering to abandon sooner, the plaintiffs lost their right to abandon, and can recover for a partial loss only.

Let commissioners be appointed to liquidate the damages, and let the cause stand over for their report.

JOHN EDGAR, PLAINTIFF IN ERROR,

versus

BENJAMIN DODGE.

A writ of error does not lie on proceedings before a justice of the peace against one for neglect of attendance on a military muster.

Fishermen on board vessels of more than ten tons burthen are exempted from military duty.

THE writ in this case was sued to reverse the proceedings of a justice of the peace for this county, who had convicted the plaintiff in error of a neglect of military duty in not appearing at a regimental muster, upon the complaint of the defendant in error, as clerk of the company to which the complaint states *Edgar* to belong. It appears from the papers sent up that *Edgar* claimed an exemption, as being a mariner

actually employed in the sea service of a citizen of the *United States*, within the act of congress passed May 8, 1792. To support his claim, he proved that he was actually employed in the *cod-fishery* on board a vessel of more than twenty tons burthen, belonging to himself and one *Benjamin Parsons*, citizens of the *United States*. And the question intended to be submitted to the court was, whether his employment in the fishery constituted him a mariner within the true intent of the act of congress.

By the court. On considering the statute, on which the process before the justice was founded, it is very clear that in this case error does not lie, as the process is summary, by complaint, to obtain a warrant of distress, and the proceedings are not according to the course of the common law, so that we could render a right judgment, if it should appear that the justice had erred. The legal remedy for the plaintiff in error is by a writ of *certiorari*.

We have however in many cases, when the proceedings have been before us on error, where error did not lie, considered them as coming before us on *certiorari*, so far as to affirm or quash them. But we have never granted this indulgence to the party, unless a question of general consequence arose, when it was of importance to have the law settled and known, for the information of the people, and for the regulation of the proceedings of inferior jurisdictions.

In looking into the act of congress, it appears that among the persons exempted from military duty are all persons exempted by the laws of any particular states. And by our statute of 1806, c. 103. all fishermen actually shipped and employed on board of any vessel of more than ten tons burthen are exempted. If therefore the plaintiff in error be not exempted as a mariner, he is now clearly exempted as a fisherman. The question brought before us is now therefore a matter of mere curiosity, and of no importance as to the public.

We are therefore of opinion that the plaintiff in error is not entitled to have the proceedings, of which he complains, examined on this writ, and that the writ ought to be quashed, as having improvidently issued. The plaintiff in error may

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move for a *certiorari*, if he think his grievance important enough to require a remedy.

Let the writ be quashed.

Note. In looking into the proceedings before the justice, *the chief justice*, observing that the plaintiff in error had pleaded the general issue of *nil debet*, and also a second plea in bar containing the defence mentioned above, said that this was an improper practice, and that justices of the peace ought not to be embarrassed with such matter; especially since by the statute of 1783, c. 42. a defendant is entitled to all evil dence under the general issue, of which he can by law avail himself under any special plea in excuse or justification.

DAVID PEARCE *versus* WILLIAM PHILLIPS.

Where goods are shipped for half the profits in lieu of freight; if by reason of a loss of a part of the goods there is no absolute profit on the whole adventure, the ship owner is not entitled to any part of the particular profits arising on that portion of the goods which are not lost.

THIS was an action of *assumpsit* respecting a sum of money carried, as an adventure for the defendant, on board the plaintiff's ship *David* to the *East-Indies*, under an agreement to allow half profits in lieu of freight and commissions.

The cause was tried on the general issue before *Sewall, J.* at the sittings after the last November term, and a verdict returned, by direction of the judge, for the defendant, subject to the opinion of the court on the evidence to be reported by the judge.

At the trial a bill of lading was produced, and an agreement written on the back thereof from which it appeared that the defendant shipped on board the *David* 3107 dollars 72 cents in specie, and that the owner of the vessel was to receive for the freight of the money out, and goods home, one half of the proceeds thereof after deducting the sum shipped

It was also in evidence that the defendant's said adventure vested at *Java* in coffee, was on board the *David*, when on her return voyage she was wrecked and lost at the *Isle of Bourbon*. The salvage of her cargo was afterwards shipped to the *United States*, and of 535 bales of coffee, the proceeds of the defendant's adventure, 366 bales, which

cost 5762 dollars 39 cents, arrived in safety at *Boston*, where at public sale it produced the net sum of 7392 dollars 47 cents, which the defendant received. The plaintiff demanded his half of the profits on the coffee which was saved, or of the difference in the costs and the proceeds of that part of the defendants adventure.

The cause stood continued to this term, when it was briefly spoken to by *Prescott* and *Story* for the plaintiff, and *Jackson* for the defendant.

For the plaintiff it was said that the sole question in the cause arises on the construction of the agreement indorsed on the bill of lading, and it was contended that as the half profits to be received by the plaintiff were in the nature of freight and in lieu of it, so they ought to be governed by the same rules. The parties, it should seem at the time of the shipment had but one event in contemplation, *viz.* the safe return of the ship and cargo: and the special contract provides only for that event. If there remained a profit, after deducting the whole sum shipped from the net proceeds thereof, that profit was to be divided. As the case which has happened was not considered, it is now open, and it is for the *law* to allow a reasonable freight on the property saved, after deducting from the proceeds a proportional part of the sum shipped. In case of a loss of a part of property carried on freight, a *pro ratâ* freight is due by law on that part which is saved, and no reason appears why this rule of law should not be applied in the present case.

For the defendant the case of *Putnam* vs. *Wood*(1), was relied upon as deciding this question. *Putnam* had shipped specie on board *Wood's* vessel to the *East Indies*, for a certain proportion of the profits in lieu of freight, &c.— There was a loss on the goods. Two questions were made: the one was whether the vessel was sea-worthy and if she was so, the other question was, whether the property saved was to be considered as a new capital, and the share of the profits made on the capital be allowed. The principal argument was on the first question: but the court would not

(1) *Ante Vol.* 3. 484.

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hear an argument as to the rule estimating the profits. They said there was no doubt but that the original amount of the adventure was first to be deducted from the proceeds, and the remainder, if any, was to be divided.

The court said they could see no difference between the case at bar and the point settled in the case cited by the defendant's counsel, that the decision in that case had been correctly stated, and unless a distinction could be shewn between the two cases, it would be useless to hear any further argument, and they ordered judgment to be entered upon the verdict.

Afterwards, while *Sedgwick, J.* was sitting over for the trial of issues, he stated that he had received a letter from *Parker, J.* informing him that he had since the decision perceived a distinction between this cause and that of *Putnam* vs. *Wood*, and regretting that judgment had been entered. And *Sedgwick, J.* thereupon ordered the entry to be cancelled, and the action was continued *nisi* for advisement.

And at the succeeding March term in *Suffolk* the unanimous opinion of the court [the *chief justice* not sitting in the cause] was delivered by

SEDGWICK, J. [After stating briefly the facts in the cause.] The plaintiff's claim of a part of the profits on the coffee which was saved is, in our opinion, contrary to the manifest intention of the contract, by which the plaintiff was entitled only, in case there should be in fact a profit arising upon the whole adventure: if there should be such a loss that no profit should accrue, the plaintiff would have no right to claim any thing. In this case therefore, there being no profit, there is nothing, to which the plaintiff can form a *just* claim. The same principle was assumed as correct, in the case of *Putnam* vs. *Wood*, which was cited at the bar, by the judgment of the whole court.

We are all of opinion that judgment must be entered according to the verdict.

JAMES FRETO, WHO SUES BY —— LEFAVOUR, HIS GUARDIAN,

vesus

JOHN BROWN.

A minor whose father is dead and his mother afterwards married, is entitled to his earnings in the service of a third person : the father in law may have an action on an implied assumpsit for necessaries, but cannot claim his earnings against the minor's consent.

Whatever rights or duties may belong to the mother as guardian by nature, they do not devolve on her husband.

THE facts in this action of *assumpsit*, which was submitted to the opinion of the court upon an agreed statement without argument(1), will appear in the opinion of the court which upon a continuance *nisi* was delivered in *Boston*, at the following March term, by

PARSONS, C. J. The action is *assumpsit* by *Freto* a minor, who was fifteen years old in 1805, to recover of *Brown* his earnings in *Brown's* service during that year.

The parties have agreed on a case, in which it is stated that the plaintiff's father is dead, and his mother married to *Robert Pierce :* that during the year 1805, the plaintiff lived in the family of his father in law, and was maintained by him ; but was a fisherman in the defendant's fishing schooner for the season, in which he earned the money demanded in this action, exclusive of the advances made for his use by the defendant, which are deducted. The balance is 71 dollars 87 cents, which *Pierce*, the father in law, also claims.

The father in law is not obliged to maintain the plaintiff, and consequently is not entitled to his earnings. While the plaintiff lived in his family, and was maintained by him, he must be considered a servant *de facto* as to strangers, who cannot question the right of the father in law to his minor's earnings. But this rule cannot bind the minor. He may quit the family at his own discretion, and can make no contract, which he cannot avoid, except for necessaries. The father in law may recover against him for necessaries upon an implied *assumpsit*, but he cannot claim his earnings against the minor's consent. If he could, the earnings might greatly exceed the expences of maintenance ; the whole of which the

(1) *Story*, for the defendant, referred the court to 2 *Mass. R.* 110, *Wright* vs. *Wright.*—*Ibid.* 113, *Benson* vs. *Remington.*—1 *Black. Com.* 453.—461.—1. *Woodeson*, 451 —3 *Esp. Rep.* 1. *Stone* vs. *Carr.*—3 *Co.* 38.—*Co. Lit.* 88. *b.*—4 *Com. Dig. Guardian, D.* 3.

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father in law would receive, and the next moment might turn him out of doors.

In this case it was intimated that the mother is guardian by nature, and that her right devolves on her husband. We know of no such right of devolution. If the right devolved, the duty must devolve, but it is clear that the father in law is not obliged to maintain his children in law, whether the mother be living or dead.

Judgment must be entered for the plaintiff for 71 dollars 87 cents, the balance of his earnings, with costs.

French for the plaintiff,

Story for the defendant.

THE INHABITANTS OF SALEM,

versus

THE INHABITANTS OF HAMILTON.

Where a new town A. was incorporated out of part of an old town B. and the act of incorporation provided that A. should pay to B. a sum of money, as a consideration for being exempted from any expense on account of paupers belonging to B. previous to the incorporation, except such as might thereafter be returned as paupers from some other town, and who were born in, or formerly were inhabitants of that part of B. which constituted A. it was held that the paupers returned to B. and not born in A. for whose support A must pay, were those who, *when* they removed to other towns, removed from that part of B. forming A. and not such as might have once lived in A. not being born there, but before they dwelt in another town, removed and lived in B. whence they in fact emigrated.

THIS was an action of the case in *assumpsit* brought to recover of the defendants the expenses incurred by the plaintiffs in the support of *Scipio Freeman* and *Rose* his wife, who, as the plaintiffs allege, were paupers having a legal settlement in *Hamilton*.

The cause was tried upon the general issue at the sittings after the last November term, in this county before *Sewall, J.* and a verdict taken for the defendants, subject to the opinion of the court, upon a case reported by the judge, whether the town of *Hamilton* is liable for the support of both or either of the paupers: if liable, the verdict to be set aside, and a verdict to be entered for the plaintiffs,

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and their damages to be assessed at the sum of thirty four dollars if liable for both the paupers, and at the sum of twenty eight dollars if liable for the support of *Scipio* only.

At the trial the notice to *Hamilton*, and their denial of the pauper's settlement there, seasonably to entitle them to that defence in this action, were admitted : and it was proved that *Scipio*, an African negro, now more than seventy years of age, was brought into *Salem*, when of the age of seven years, and was there sold as a slave to *Samuel Lummas*, and continued with him until his death in 1744 : That he then became the property of his only son and heir *John Lummas*, that both the father and son resided upon their farm, situate in that part of *Ipswich* which now constitutes the town of *Hamilton* by virtue of the statute of 1793, c. 10. until the year 1770, when *John Lummas* purchased a farm in the other part of *Ipswich*, on which he resided until his death in 1787. In 1775, after the commencement of the revolutionary war, *Scipio* deserted from his master, and became a soldier in the *American* army for a short time, when he was reclaimed by his master, who transferred him to *T. P.* of *Wenham*, with whom he continued for several years, until for a consideration in money paid to *T. P.* who promised him his freedom, he again enlisted in the *American* army as a soldier for the town of *Wenham*. In the year 1780, an informal marriage took place between him and *Rose*, and they have ever since lived together as man and wife.

The cause stood continued to this term, and was now argued by *Prescott* for the plaintiffs, and *Dane* for the defendants ; after which the opinion of the court was delivered by

PARSONS, C. J. [After a brief statement of the facts as reported by the Judge.] From these facts it appears that *Scipio* was in 1770 the reputed slave of *John Lummas*, living with him in *Ipswich*, and in that part of it not included within the limits of *Hamilton*. *Scipio* was therefore once settled in *Ipswich*, his settlement being derived from his master's. Before the incorporation of *Hamilton* he had left *Ipswich* and was considered as a freeman. Whether he had gained a new settlement with another master in *Wenham*, it is not material now to decide ; as it is sufficiently clear that before the incorporation of *Hamilton* he had removed

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from *Ipswich*, and was not then the slave of any person having his settlement in that town, and living in that part of it which afterwards formed *Hamilton*.

Upon the incorporation of *Hamilton*, which was before the statute of 1793, c. 34. if no provision had been made respecting the poor, all persons *then* living within the limits of *Hamilton*, being settled in the town of *Ipswich*, would have gained a new settlement in *Hamilton*, and no other persons, unless by a settlement derived from some person who thus acquired a new settlement.

Independent then of any provision in the incorporating act, *Scipio* had no settlement in *Hamilton*. But the act provides that *Hamilton* shall pay to *Ipswich* a certain sum of money, as a consideration of being exempted from any expense on account of any poor person belonging to the town of *Ipswich* previous to the incorporation, except such persons as might thereafter be returned as paupers from some other town, and who were born in, or formerly were inhabitants of that part of *Ipswich* which now constitutes *Hamilton*: and that the plaintiffs might avail themselves of this provision, the report states that *Scipio's* master *J. Lummas* before 1770 lived in that part of *Ipswich* afterwards within the limits of *Hamilton*, *Scipio* living with him as his slave.

Without this provision *Ipswich* must have continued to be charged with all paupers settled there, in whatever part of the town they had dwelt, who inhabited elsewhere at the time of the incorporation, without having any claim on *Hamilton* for contribution(1). The manifest intent of this provision is, that paupers settled in *Ipswich*, who lived elsewhere at the date of the act of incorporation, and were afterwards returned upon *Ipswich*, should be at the charge of *Hamilton* and this latter might be compelled to reimburse *Ipswich* for any expenses it might incur for their support, if such paupers so returned upon *Ipswich*, were born or formerly inhabited within the limits of *Hamilton*.

The plaintiffs have argued that *Scipio* formerly inhabited within those limits. This is true: but before he left *Ipswich*,

(1) *Ante* 384.

he had removed to and inhabited within another part of *Ipswich* without those limits: from which last part he removed when he left the town. And to give the statute a reasonable construction, we are satisfied that the paupers returned to *Ipswich* and not born in *Hamilton*, for whose support *Hamilton* must pay, are those paupers who, when they removed to other towns, removed from that part of *Ipswich* which is now *Hamilton*: and not any paupers, who might once live in *Hamilton*, not being born there, but before they dwelt in another town removed and lived in *Ipswich*, whence they in fact emigrated. Thus in a subsequent statute of 1793, c. 34. introducing a new law on the division of towns, and providing that a pauper, having removed elsewhere at the time of the division, shall have his settlement in that town, in which his former dwelling place shall happen to fall; the dwelling place must mean that from which he removed.

We are therefore of opinion that *Hamilton* is not obliged to maintain *Scipio*. But it may be added that if, on the plaintiff's construction, *Scipio* was a charge upon *Hamilton* because he once lived there, yet the suit ought to have been brought against *Ipswich*, where his settlement was; who might compel *Hamilton* to reimburse them. For the act, in exempting *Hamilton* from expense on account of paupers who might be returned to *Ipswich*, not having been born nor having formerly lived in *Hamilton*, by a reasonable construction makes *Hamilton* chargeable to *Ipswich* for expenses incurred on account of the paupers returned, who were born in, or who had formerly lived in *Hamilton*, and consequently does not alter the settlement of any of the paupers not inhabitants at the time of the incorporation.

If *Rose's* settlement is in *Hamilton*, it is admitted that it is derived from her husband *Scipio*: but as he is not settled there, so neither is his wife *Rose*.

Whether *Scipio's* settlement remains in *Ipswich*, or whether he gained a new settlement by the supposed sale in *Wenham*, we do not now determine; as neither *Ipswich* nor *Wenham* are before us.

Let judgment be entered upon the verdict.

FRANCIS QUARLES, JUN. AND OTHERS

versus

FRANCIS QUARLES.

Where one by deed, purporting to be made for a valuable consideration, conveyed to his son certain lands in fee, and the son, by his deed of the same date, acknowledging himself satisfied as his share of the father's estate, acquitted and discharged the estate from any demand thereon as heir: the son died, and afterwards the father died intestate: the children and heirs of the son bring their action for their distributive share of their grandfather's estate, and it was held an *advancement* to the son in full, and the grandchildren were barred.

THIS was a *writ of entry*, in which the demandants counted upon their own seizin within twenty years, and upon a disseizin by the tenant.

The tenant pleads that the demandants are not entitled to their action, because *Francis Quarles*, father of the tenant, and grandfather of the demandants, had children, *viz. Francis* the tenant, *Elizabeth*, wife of *Nathaniel Potter*, and *Samuel* father of the demandants: and the said *Francis* the father having on the 17th of August, 1785, assigned and delivered to his son *Samuel* a full portion of the estate of the said *Francis* the father by advancement, he the said *Samuel*, at the same time, and in consideration of such advancement, by his deed of that date, sealed with his seal, and in court to be produced, acknowledged himself fully satisfied and contented therewith, as and for his full share and portion of the estate of the said *Francis* the father; and did therein and thereby fully acquit and discharge all right and claim, which he the said *Samuel*, or his heirs or legal representatives, might have to the estate of the said *Francis* the father, or any part thereof, by inheritance. And afterwards on the 17th of January, 1787, the said *Samuel* died. And the tenant avers that the demandants have no other right in the demanded premises than what descended to them as children and legal representatives of the said *Samuel*. And afterwards on the 20th of April, 1787, *Francis* the father died seized in fee of and in the whole of the land described in the demandant's writ, leaving the said *Francis* the tenant, and his sister, the said *Elizabeth*, to whom the same descended, in exclusion of the children and representatives of the said *Samuel*, by reason that he had his full portion, &c. and gives colour, &c. wherefore he prays judgment, &c.

The demandants pray oyer of the said deed, which is set forth: and therein the said *Samuel* declares that whereas he has this day received of his father a deed of certain land, &c.

describing it, "of which he hath given me a certain part; in "consideration of which I am fully satisfied and contented "as my share of his estate: furthermore do fully acquit and "discharge my father's estate forever hereafter from hav- "ing any demand thereupon, as an heir to any part there- "of." Which being read, &c. the demandants say that the said *Francis* the father, on the said 17th day of August, 1785, by his deed, &c. sealed, &c. and in court, &c. for a valuable consideration, *viz.* the sum of 233*l.* 6*s.* 8*d.* lawful money, gave, sold and conveyed to the said *Samuel* in fee a certain tract of land, &c. [being the same parcel described in the deed before mentioned] and prays judgment, &c.

The tenant, after oyer of the deed, which is a conveyance in common form of the same land, expressed to be for the consideration of 233*l.* 1*s.* 6*d.* rejoins, that the said *Francis* the father conveyed the same land not only in consideration of the sum of money therein expressed, but also as and for a full advancement to the said *Samuel*, as his part and portion of the estate of the said *Francis* the father; and that the said *Samuel* did, by his deed aforesaid, accept the said land, as such *advancement*, and in full satisfaction of his share and portion of the estate of the said *Francis* the father.

To this rejoinder the demandants tended a general demurrer, which is joined by the tenant.

Upon these pleadings the cause was argued at great length at the last November term in this county, by *Andrews* and *Prescott* for the demandants, and *Dana* and *Putnam* for the tenant. There having been a final difference of opinion in the court, and the judges on either side having gone very fully into the reasons of their several opinions, which were delivered at this term, the arguments of the counsel are omitted.

SEDGWICK, J. The facts presented in this case for the consideration of the court are, that the demandants are the children and heirs of *Samuel Quarles* deceased, who was the son, and one of the heirs of *Francis Quarles* who is also deceased; that the tenant is another son of *F. Quarles;* that on the 17th of August, 1785, *F. Quarles* last mentioned conveyed to the father of the demandants certain real estate, by a deed purporting to be for a valuable consider-

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ation ; and the son on the same day made and executed a deed to his father, in which he acknowledged that, in consideration of his father's conveyance to him, *he was fully satisfied and contented as his share of his father's estate, and did thereby acquit and discharge his father's estate forever thereafter from having any demands thereupon as an heir to any part thereof.*

Here was a fair contract understandingly entered into between the parties ; that the father should give to the son a certain portion of his estate, and that it should be received by the son, in full satisfaction of any claim he might otherwise afterwards have as an heir to his father ; and this contract was carried into execution, as far as it was in the power of the parties to do it, by their deeds respectively. The meaning of the parties it is impossible to mistake : it was fair and honest, and it is right and proper that it should be carried into effect : and it must be so, unless positive rules of law prevent it.

In the argument it was supposed by the counsel for the demandants that the acknowledgment in the deed of *Francis Quarles* the elder, *that it was made for a valuable consideration*, had concluded the tenant from setting it by as an *advancement* to *Samuel*. What then are we to say to the deed of *Samuel* to his father, made on the same day, in which he expressly acknowledges that it was made as an *advancement*, and as such received by him ? Certainly *Samuel* was as much concluded by his acknowledgment as his father was by his. But we are not entangled by this difficulty ; for the principle is, I think, most clearly established, that when one consideration is expressed in a deed, any other consideration consistent with it may be avered and proved(1). Now it is perfectly consistent, that although the consideration money expressed in the deed might have been paid, yet that, from the greater value of the estate conveyed, it might have been intended as an advancement. This the tenant in the rejoinder expressly avers, and it being an averment, which by law he was authorized to make, the fact is confessed by the demurrer.

(1) *Com. Dig. Tit. Bargain and Sale, B.* 11.—*Bac. Abr. same tit. D.*—1 *Co.* 176, *Mildmay's case.*—2. *Co* 76, *L. Cromwell's case.*—3 *Term. Rep.* 474. *Rex* vs. *Inhabitants of Scammonden.*

I do not think it necessary for the decision of this cause, so far as respects the statutes of the government, to go back beyond that of 1783, c. 36. the fourth section of which, after directing partition to be made of the estate of an intestate among his children or heirs as the act directs, proceeds, "unless it shall so happen that some one or more of the "children or grandchildren shall have portions of the intes- "tate assigned or delivered to them by him in his lifetime; "in which case such portions shall be taken into considera- "tion, and deducted from their shares in such partition res- "pectively." Now the demandants' father had a portion of the intestate's estate assigned to him by the intestate in his lifetime; and it must be taken into consideration.

But it is said that the demandants have established their title as heirs; and as all questions of *advancement* are the subjects peculiarly of probate jurisdiction, until it appear by the judgment of that court that the provision made for *Samuel* was an advancement, the title of the demandants, as his heirs, remains unaffected by it; and that they are entitled to recover in a court of law.

What influence this argument would have had upon my mind, if it had been a *partial* advancement, I do not undertake to determine. But when the deed of the immediate ancestor of the demandants (they claiming as his heirs) is shewn to the court, by which it is demonstrated that they have no title, I know no principle of law, by which we are hindered from declaring it.

It has been further urged, that the evidence of what shall be deemed an advancement, is confined to the instances expressed in the seventh section of the statute, which enacts; "that any deeds of lands or tenements made for love and "affection, or where any personal estate delivered a child "shall be charged in writing by the intestate, or by his or- "der, or a memorandum made thereof, or delivered express- "ly for that purpose before two witnesses who were bid to "take notice thereof, the same shall be deemed and taken "an advancement," &c.

It is evident to my mind, that the intention of the statute was to substantiate certain species of evidence, which, with-

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out legislative provision, might be doubtful; and not to enumerate those particular species, to the exclusion of all others. Evidence of advancement may be given in many ways by parole, by writing and by deed, other than that which is expressed; and if that evidence, derived from either of these sources, (and in many instances it may be much more satisfactory than that mentioned in the statute), for the exclusion of which there could exist no good reason, be not admissible, there would exist many cases, where there had been an actual advancement, without a possibility of proving it. What could be more absurd than that a charge or memorandum by the intestate should be evidence of the advancement of a child, while a solemn acknowledgment by his deed, as in this case, should not be at all admissible evidence for the same purpose? It is impossible to believe such could have been the intention of the legislature. And in the case of *Scott* vs. *Scott*(2), the court went into an enquiry, by other evidence than that specified in the statute, to determine whether the estate conveyed by deed was or was not an advancement.

The only questions involved in this case, and which are necessary to decide it, are 1. Was the conveyance to *Samuel* an advancement? And if so, 2. Is it to be considered as an advancement *in full* of his share of his father's estate?

That it was an advancement, and an advancement in full, is acknowledged both in the deed of *Samuel*, and in the record before us. Can there be evidence of a higher nature, or which ought to be deemed more satisfactory? I think not. An advancement then was made. It must be considered according to the provision of the statute: and by what rule of law shall we say that the effect, which was contemplated by the parties, and fairly and honestly intended, shall be defeated? I have been able to discover no such rule. The parties were perfectly competent to make the contract, and I therefore conclude that it ought to be deemed obligatory.

But it is said that the father of *Samuel*, after the agreement which is expressed in the deed, might have acquired property, and that it would be equitable that *Samuel* should have his proportion of it.

(2) *Ante Vol.* 1. 527.

To this supposititious case I answer 1. That the record before us presents no fact of that kind, and that we have no right to form conjectures about it. Had the demandants relied on the fact which the argument supposes, it ought to have been alleged in the pleadings: for the supposition implies that it is material. But no such fact appears, and *de non apparentibus, et de non existentibus, eadem est ratio.* 2. That the residue of the father's estate, after the conveyance to *Samuel*, might have been diminished or wholly lost before the father's death, so as to have deprived the other children of any portion. And 3. That if the circumstances of the father rendered it reasonable, in his opinion, for *Samuel* to have a greater portion than he received by the conveyance, he would probably have made the provision in his will. All contingencies were the subjects of contemplation and of contract; and after being considered the contract was formed: and why should it not be executed?

The *English* statute of distributions, which in this respect is the same in principle with our own, was grounded on the custom of *London* relative to orphanage. This is most evident from the whole current of their authorities, when enquiring what shall be deemed an advancement within the statute, when it should be put into hotchpot, &c. And it is not unfrequently expressed or implied that this is the case. I will mention only the case of *Holt* vs. *Frederick*(3), which is a remarkable one for this purpose. The mother being a widow gave her daughter 1000*l.* marriage portion. After the death of the mother it was determined that this advancement should not be brought into hotchpot. The consideration which seemed to be decisive was, that the statute of distribution was grounded on the custom of *London.* There can be no good reason given, why the same facts, which would establish an advancement to have been made within the custom, should not prove it equally such within the statute. And the same reasoning applies equally to both statutes, the *English* and our own. There is in fact but one difference between them, and that respects real estate; and

(3) 2 *P. Will.* 356.

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it results from the different lights, in which the laws of that country, and of this, view real property. There lands of inheritance are not, unless expressly so received, an advancement, but here they may be. In other respects there is not, so far as can bare on the question before us, any distinction which can make a difference. It will be proper then to cite, from the *English* authorities, cases to prove what has been adjudged an advancement within the custom of *London*, and when they shall be taken to be in full.

In *Fawkner* vs. *Watts*(4), it was determined that proof of an advancement is *primâ facie* evidence of an advancement in full. Now in the case under consideration there is doubtless evidence of an advancement; and no fact having been shewn to disprove it, the *primâ facie* evidence has become conclusive, that the advancement was in full.

In the case of *Edwards* vs. *Freeman*(5) it appears that provision made for a child when it shall arrive at a certain age, if it arrives at that age, is an advancement; and it is sufficient if it be secured, although not advanced in the life of the father; nor is it an objection, that it depends on a contingency.

In *Metcalfe* vs. *Ives*(6), a man and woman, who intended to intermarry, before their marriage enter into articles, by which they covenant, in consideration of 2000*l.* which was her portion, to *release* all right which might accrue to them out of the father's estate by the custom of *London*: and it was determined that her claim was thereby barred.

In the case of *Lockyer* vs. *Savage*(7) it was adjudged that a woman, who, in consideration of 4000*l.* advanced by her father, *released* her right to her share, was thereby barred.

In *Hancock* vs. *Hancock*(8) it was resolved, that where the wife of a freeman of *London* is compounded with before marriage by settling a jointure upon her, although it be of lands, she is barred of her customary share.

And in *Cox* vs. *Balitha*(9) it was adjudged, that if lands *of inheritance* be given to a child, in lieu of her orphanage part, and accepted as such, it will be binding.

(4) 1 *Atk.* 405, 406.
(5) 2 *P. Will.* 435.
(6) 1 *Atk.* 63.
(7) 2 *Str.* 947.
(8) 2 *Vern.* 665.
(9) 2 *P. Will.* 274.

It would be endless to mention all the cases, which have been determined upon similar principles. Enough have been noticed, to comprehend every point of the case before us so obviously as to render an application of the authorities superfluous. If the same rules of construction, as to the nature and effects of an advancement in cases within the custom, are to be applied to cases within the statute, there can be no doubt what the judgment ought to be. And it will be difficult to find a reason why different constructions should be given: why an advancement within the custom should mean one thing, and an advancement within the statute another. When the statute of distributions was passed, in consequence of the custom of *London*, the nature and effects of an advancement were well known; and when the legislature extended the same principle to the whole community, it cannot, in my judgment, be supposed, that it should be extended in a different manner. The reason why we cannot find any thing explicit upon the subject *under the statute* is, I conceive, because former determinations *under the custom* had settled the law in relation to it.

The deed in this case, it is true, cannot operate technically as a deed of release, as the deeds in the orphanage cases did not: but there they operated to bar the orphans for the best reason, in the world, because they had agreed that they should: and here, in my opinion, for the same reason, this deed ought to have the same effect: and that therefore the demandants ought not to recover.

PARKER, J. of the same opinion.

SEWALL, J. [After reciting the substance of the pleadings.] The deeds of *Samuel* and of *Francis* the father are of the same date, and refer to the same conveyance, property and transaction; and being in no wise inconsistent, are to be construed as one instrument, expressing together the contract of the parties. And in this view it appears that *Francis* the father, on the 17th of August, 1785, conveyed to his son *Samuel*, the father of the demandants, a certain farm, &c. in consideration of a sum of money, and in *some uncertain part*, as an advancement in full of *Samuel's* share in his father's estate; which *Samuel* accepted accor-

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dingly, and by his deed acquitted and discharged his father's estate forever thereafter from having any demand thereupon as an heir to any part thereof.

Notwithstanding this contract and acquittance by their father, the demandants claim as heirs to their grandfather *Francis* a share and portion of his estate, he having survived his son *Samuel*, and afterwards died intestate.

The pleadings admit the descent and heirship of the demandants: and the act [1783, c. 36.] directing the descent of intestate estates, &c. provides that when any person shall die seized of lands, &c. not by him devised, the same shall descend in equal shares to and among his children, and such as shall legally represent them, (if any of them be dead) except the eldest son, &c. who shall have two shares, &c. And the general question to be decided is, I think, whether the contract and writings, between *Francis* the grandfather of the demandants and *Samuel* their father, have defeated the inheritance of the demandants, or in any manner estop or bar them of the fruit of it.

The demandants claim *their* inheritance; for although their share is to be ascertained by a reference to their father, and is said to be in right of representation; yet it is *their* right, and never was *his*. *Nemo est hæres viventis*. It will not be questioned that this contract or bargain of *Samuel*, if it had been made with a third person to sell and convey a share and portion of the estate of *Francis* the father, would have been utterly void and without effect as a conveyance, whatever had been the consideration, even if *Samuel* had survived his father, and had become entitled, as an heir, to the share and portion intended to be conveyed. But when he dies before his father, and never acquires any share or portion in his estate, the operation of any deed, in the case supposed, must be considered as at least defeated by the event.

The general rule of the common law is, that no right passes by a release, but a right which the releasor hath at the time of the release made(10). I need not multiply authorities to establish this rule, or to shew its application. Indeed the coun-

(10) *Co. Lit.* 265.

sel for the tenant have not, either in their pleas or arguments, relied upon the release of the demandants' father, but rather upon the collateral satisfaction accepted by him in full. And in this view the principles of the common law are equally against them: particularly the rule cited from *Vernon's* case(11), that a right or title, which any one has to any lands or tenements of any estate of inheritance or freehold, cannot be barred by acceptance of any manner of collateral satisfaction or recompense. And this lord *Coke* states to be the reason why no collateral satisfaction or recompense made to the wife, in satisfaction of her dower, was any bar to her dower by the common law. And he says, if a man, in consideration of a marriage afterwards to be had with A. makes an estate of certain lands to her for her life, in full satisfaction of all the dower, which after marriage may accrue to her in any of his lands, and afterwards they intermarry, that was no bar of her dower at the common law for two reasons; one because she had no title of dower at the time of the acceptance of the satisfaction; secondly because no collateral satisfaction can bar any right or title of any inheritance or freehold. Both these reasons apply strongly in the case at bar against the plea of the tenant.

In *Vernon's* case however the decision maintains a plea of satisfaction by jointure in bar of dower, and in that view was cited as a case in point for the tenant. But that decision rests entirely upon the authority and construction of a provision in that case in the statute of uses [27 *H.* 8. c. 10.]: and in the case at bar, if the plea and rejoinder of the tenant avail to bar the demandants, it must be altogether by virtue of our statute already cited directing the descent of real estates, and especially that clause of it, which provides in the case of advancements. It is therein provided that partition shall be made, &c. as the act directs, "unless it shall so happen "that some one or more of the children or grandchildren "shall have portions of the intestate assigned or delivered "them by him in his lifetime; in which case such portions "shall be taken into consideration, and deducted from their "shares in such partition respectively."

(11) 4 *Co. Rep.* 1.

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In construing the deeds of *Francis* the father and of *Samuel* together, as I think they must be, they appear to me to be conclusive evidence of an advancement. The objections offered in this view of the subject from the seventh section of the same statute have been satisfactorily answered. The modes of evidence there enumerated are examples only, and not exclusive provisions. But this advancement was to the child, who in the event never became entitled to any portion in his father's estate as an heir to his father. And although the demandants claim by a right of representation, yet the descent is immediate to them: and there may be some doubt, I think, whether the statute has made any provision in the case of an advancement to the son, when after his death a portion is claimed by the grandchildren in the estate of a grandfather, who had survived the father.

Avoiding this difficulty for the present, and being indeed inclined to the opinion that the statute may be extended constructively to this case, the question then is upon the sufficiency of the plea and rejoinder, which contain no averments respecting the estate of *Francis* the father, nor any averments by which the court can judge whether the advancement alleged was an adequate portion, or a just and equal share according to the actual circumstances of his estate. And in short the merits of the pleas in question, and of the defence, appear to me to rest upon the effect of the acceptance *in full* by *Samuel*. The objections in this view of the case have been already suggested; and for myself I see no provision of the statute, which operates to bar a child or grandchild of his portion and share by an advancement. On the contrary the statute provides that advancements shall be taken into consideration, and deducted from their shares in the partition, &c. And the consequence of this reasoning is, I think, that every effect allowed to the facts pleaded by the tenant beyond the provisions of the statute ought to be warranted by some rule or principle of the common law.

An analogy has been attempted to be drawn between this case, and the cases which have been decided in the courts of common law, but principally in the courts of chancery, in *England*, upon the effect of advancements by the custom of

London. The decisions, which have been cited and examined, so far as they are in any respect applicable, appear to determine, that a declaration by the father, that an advancement was in full, will not operate to prevent a child from an orphanage part, he bringing the advancement into the distribution. And although by the custom the case of an advancement in full is especially recognized; and anciently the customary share was a sort of inchoate right, preserved to the child against the will of the father, yet there is no decision at common law, that an acknowledgment of an advancement in full made by a child in the lifetime of the father, operates as a release or extinguishment. In *lex testamentaria*, the author treating of the custom of *London*, and citing from a book entitled *Privilegia Lond*(12), states that if a freeman advance his son or daughter with a portion, and they being of full age give him a release of all claims, which they might have on his estate at his death; or if the daughter after marry, and her husband gives the father the like release, such releases are void; and the reason is, because neither of them had any right or claim to any part of the father's estate until after his death. In chancery a specific effect has been given to releases and contracts to release, when children have accepted advancements in full, by construing them alike, and by decreeing a specific performance: and in one case, that of *Lockyer & al.* vs. *Savage & al.*(13), by decreeing against the assignees of a bankrupt, that the child of a freeman of *London*, when of age, may in consideration of a present fortune bar herself of her customary part. Decrees in cases of this kind are made after a full enquiry into the equity of the case, and the comparative value of the advancement. The application of these decisions, in a question of common law, it is liable however to this general objection, that the custom itself, and the maxims and rules forming parts of it, and by which it is enforced, are, in some degree at least, in derogation of the common law, and arguments from one to the other are not always conclusive.

The statute of distributions in *England* contains, as to personal estate, a provision very similar to the clause of the

(12) *Lex. Test.* 426.
(13) 2 *Eq. cas. abr.* 272.—2 *Str.* 947.

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statute of this commonwealth relied upon in the case at bar. It is remarkable, that no question of a release, or an acknowledgment of an advancement in full, or a collateral satisfaction in the lifetime of an intestate, has ever arisen under the statute of distributions. The reason may be, and it is the only probable one in my apprehension, that advancements are enforced under the statute, not by a supposed release or extinguishment of the right or claim of the party in any case; but as a matter of set-off and adjustment in the distribution.

I am upon the whole inclined to the opinion that such ought to be the course in the case at bar; and that the rejoinder of the tenant is insufficient in law to maintain his plea; or rather that the plea itself is not a sufficient answer to the demandants' claim.

The chief justice, having been formerly of counsel in the action, gave no opinion.

Judgment for the tenant.

JAMES GILCHRIST *versus* JOSHUA WARD.

Specie was shipped on a voyage from the *United States* to *Sumatra* and back to *Europe*, under a contract with the owners to receive half profits in lieu of freight. At *Sumatra* the property of the owners and shipper was invested in a cargo for *Europe*, where, upon the sale thereof, the supercargo caused them to be credited with their respective proportions of the proceeds. The share of the owners was duly remitted to them, with half the profits on the adventure of the shipper, who having directed a particular appropriation of his share, the same remained in the hands of a merchant, by whose failure a loss accrued thereon. This was held to be the loss of the shipper, of which the owner was not liable to bear any part.

THIS action which was case in *assumpsit*, was tried before *Sewall, J.* November term, 1806.

The report of the judge, who sat in the trial, states that the plaintiff was owner of one quarter of the brigantine *Pompey*, and master of her for a voyage from *Salem* to *Sumatra*, and the defendant was owner of another quarter. The plaintiff, by the orders excepted from the other owners, agreed and undertook to proceed to *Sumatra* for a load of pepper, and to go from thence to *Cowes* in the *Isle of Wight*, and there wait for orders from Mr. *Williams* their agent in *London*.

George Dodge and *Stephen Webb*, each for himself, by agreement with the defendant, and upon his part of the vessel, shipped several parcels of money receipted for by the plaintiff September 18, 1802, who undertook to invest the proceeds

in pepper, and to proceed therewith, as with the owners' property, the shippers allowing him 5 per cent. commissions and half the profits.

Upon his arrival at *Sumatra* the plaintiff obtained 242 piculs of pepper for *Dodge*, and the like quantity for *Webb*, and signed bills of lading for the same, to be delivered to their orders at *Cowes*.

The plaintiff, stopping at the *Isle of France* in his passage from *Sumatra*, contracted June 2, 1803, with certain *French* merchants for one franc per lb. payable in silver money at *Bourdeaux*, to carry his whole lading of pepper to that port; where upon his arrival the same was delivered in good safety, and produced 247,427 *fr.* 41 *cts.* The plaintiff there kept distinct accounts with the owners and freighters, and credited to each their respective proportions of the sales; and particularly to *Dodge* and *Webb*, for the proceeds of their shipments 39,119 *fr.* 40 *cts.* At *Bourdeaux* the plaintiff employed *Strobel* and *Martenez* to manage the concerns of the voyage, and deposited with them the proceeds of the pepper, and drew out for sundry investments and purchases the part thereof belonging to the owners of the brigantine: but the amount credited to *Dodge* and *Webb* by *Strobel* and *Martenez*, as well as by the master, remained in their hands until their failure about December, 1803, or January, 1804.

As soon as the plaintiff had intelligence of that event, he obtained from them, on account of Mess. *Dodge* and *Webb*, several trunks of goods, which *Strobel* and *Martenez* had previously laden on board the brigantine on their own account, and for the balance due received bills of exchange on *Nathaniel Richardson* of *Salem*.

Upon the return of the brigantine to *Salem*, the plaintiff offered the trunks of goods and the bills of exchange to *Dodge* and *Webb*, as the proceeds of their adventures; but they refused to accept them, and commenced an action against the plaintiff. This dispute was finally adjusted by the award of referees mutually chosen by the plaintiff and *Dodge* and *Webb*, which award the plaintiff paid, and disposed of the proceeds of their adventures, excepting the bills of exchange, which were protested, and have never been paid. In this operation the plaintiff sustained a loss of 2520

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dollars 90 cents, the difference between the sums awarded to Mess. *Dodge* and *Webb*, and the actual proceeds of their adventures.

The plaintiff, in adjusting with the other owners of the brigantine the accounts of this voyage, neglected to charge them with any part of this loss; and sustained a further loss in the credit given to the owners for half profits upon the adventures of *Dodge* and *Webb*, having credited 1825 dollars whereas the half profits, according to the final adjustment, amounted only to 1600 dollars; or by the several accounts mentioned, and the said award appeared.

From certain letters read at the trial, it appeared that the plaintiff confessed the contract at the *Isle of France*, and the voyage to *Bourdeaux* to be contrary to his orders and agreement, but thought himself justified by the expected profits he acknowledged the receipt of advices from Mr. *Williams*, the correspondent of Mess. *Dodge* and *Webb*, directing the remittance of the net proceeds of their adventures to be made in good bills upon *London*. From the testimony of —— *Buffinton* it appeared that money of *Dodge* and *Webb*, deposited with *Strobel* and *Martenez*, was intended to have been applied to the purchase of bills on *London*: and from his and other testimony, that it was difficult at that time to purchase good bills in *France* upon *London*: and that *Nathaniel Richardson* was indebted to *Strobel* and *Martenez* to the amount of their bills upon him, and more: but that he had failed and left this country before the bills arrived.

The plaintiff moved to give evidence that the voyage to *Bourdeaux* was more advantageous to the owners than the voyage proposed by them would have been: but the judge refused to go into this enquiry.

A verdict was taken for the plaintiff for 691 dollars 30 cents damage, including interest from the service of the writ, subject to the opinion of the court, whether this action is maintained for the sum found by the jury, or any other sum, upon the facts and evidence stated. And the verdict was to be set aside or amended, as the opinion of the court should be.

The action stood continued to this term for argument, and now

Prescott of counsel for the defendant contended that the loss, for which the plaintiff claims an indemnity in this action, having been occasioned by his own misconduct in the breach of his orders, he alone ought to suffer. But if the defendant was bound to contribute to any loss upon the joint stock, the case sufficiently shews that the loss in this case was on the property of *Dodge* and *Webb* only, which had been kept separate and distinct from that of the owners, and was alone in the hands of *Strobel* and *Martenez* at the time of their failure. If a loss had happened to the property remitted to the owners, *Dodge* and *Webb* would not have been held to contribute to it, if the proceeds of their own adventures had arrived in safety ; and for the same reason the owners are not bound to contribute to the loss arising on the property of *Dodge* and *Webb*.

It appears further that Mr. *Williams* ratified the plaintiff's act in going to *Bourdeaux*, by his directions respecting the purchase of bills, and thus precluded his principals *Dodge* and *Webb* from any claim on the plaintiff for his breach of orders : and it may be added that the delay of the plaintiff in drawing their property out of the hands of *Strobel* and *Martenez* was owing to his conformity to those very directions, which induced a greater degree of caution in the purchase of bills of exchange. It is clear therefore that the plaintiff was not obliged to pay Mess. *Dodge* and *Webb* any thing. As to the award of the referees, it was *res inter alios acta* : the defendant was no party to the submission, which took place without his consent or knowledge, and of course is in no degree binding upon him.

Jackson, for the plaintiff, confessed that his client was chargeable with a breach of orders : but he insisted that the defendant and the other owners had fully ratified all his doings, by receiving the property remitted to them from *Bourdeaux* by the plaintiff, and by afterwards adjusting with him the accounts of the voyage(1). If they chose to accept the profits arising out of the plaintiff's alleged misconduct, they ought on every principle to submit to take their share

(1) *Colwise & al.* vs. *Hacker*. 1 *Caine's N. Y. Rep.* 526.—*Thurston* vs. *Columbian Insurance Company*. 3 *Caine's N. Y. Rep.* 89.

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of the misfortunes or burthens arising out of the same cause. We admit that a master, if he will undertake to break his orders, does it at his own risk, and must answer strictly for the consequences: but if the owners expressly or impliedly ratify his acts, they cannot afterwards dissent from them, but are strictly bound by them. The case may therefore be considered in the same light, as if the orders to the plaintiff had been to pursue the same voyage which he pursued in fact.

It has been said by the counsel for the defendant that there was a severance of the property of the owners from that of *Dodge* and *Webb* previous to the loss, and therefore that the former are not liable to contribute. But the facts shew that the whole cargo was put into the hands of the factors at *Bourdeaux* as a joint stock, and we contend it so continued as long as it remained in their hands. As the proceeds of any part were drawn out and shipped for the owner's account, they then became their distinct property. Had the factors failed while the whole property remained in their hands, the loss would have been joint. It was by accident that opportunities offered to remit to the owners here, before the plaintiff was able to procure good bills to remit to Mr. *Williams* for the account of *Dodge* and *Webb*. He could not remit on the joint concern, for his orders were different. It depended on his discretion, or the circumstances of the moment, whether the property drawn from the factors should be placed to the amount of *Dodge* and *Webb*, or of the other owners. It so happened that the remittance for the owners was first drawn out; what remained in the possession of the factors was part of the joint stock, and being lost, we contend it was a joint loss, and ought to fall on all the concerned.

There is no pretence for saying that Mr. *Williams*, as agent for *Dodge* and *Webb* ever ratified the plaintiff's act in going to *Bourdeaux*. He had indeed no authority to do so, for all communication from his principals to him was previous to any knowledge on their part of the plaintiff's intention: and in fact he carefully avoids any such appearance. He directs the plaintiff to remit the proceeds to him; but at the same time says it would have been much better if he had obeyed the orders given him.

As to the objection that the loss arose from the plaintiff's delay in procuring bills of exchange, it is a fact within the knowledge of every one that at the period of this transaction there was a great difficulty in procuring good bills in *France*. Failures were very frequent, and owing to the interruption of intercourse between *France* and *England*, it was necessary to be very cautious in the mode of remittance. There is no ground to charge the plaintiff as guilty of laches.

But allowing that the defendant has never ratified the plaintiff's act in breaking his orders, and that he has no claim on account of the loss by the failure of *Strobel* and *Martenez*, there is still the sum of 225 dollars due to the plaintiff for so much allowed the defendant and the other owners by mistake in adjusting the account. They were credited the sum of 1825 dollars for the half profits on *Dodge* and *Webb's* adventures. But as these latter disavowed the plaintiff's breach of orders, he was obliged to settle with them in the same manner, as if he had gone to *Cowes* as he was directed. It seems that the half profits of *Dodge* and *Webb's* adventures if sold at *Cowes*, would have been but 1600 dollars, which sum only was allowed by the referees ; and this was all the owners were entitled to on account of the profits, if they insist on the plaintiff's breach of his orders.

Prescott in reply. If the owners have ratified the plaintiff's conduct at all by their settlement with him, they ratified it no farther than they were interested. They having barred themselves of their claim on him for the damage they sustained by his breach of orders, cannot make them answerable for what he has been obliged to pay other parties for the same misconduct.

The cases cited for the plaintiff from the *New York* reports do not apply. The case of *Codwise & al.* vs. *Hacker* was a suit by the owners against the master for his breach of orders : and it was decided that their having insured the property, and having received it from the master after knowing of his breach of orders, barred them of their claim upon him, and was a ratification of his conduct. But if it had been, as the present case is, a suit by the master against one of the owners, for a contribution to what he, the master,

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had been forced to pay other owners who had not ratified his conduct, the decision would have been very different.

It is true that all the property was put into the hands of *Strobel* and *Martenez* as a joint stock: but before any loss happened all of it was drawn out except that portion which belonged wholly and exclusively to *Dodge* and *Webb*. But admitting that what remained still constituted a part of a joint stock, yet none of the partners had a right to direct any part of it to continue at the joint risk an unreasonable time for his own particular purposes. If *Dodge* and *Webb*, for whose use this portion of the property remained in the hands of the factors, have ratified the plaintiff's acts, they should have borne the loss: if they have not, the plaintiff must bear it himself.

It was contended for the plaintiff, that if the defendant is not held to contribute to the loss arising from the failure of *Strobel* and *Martenez*, yet that the plaintiff is entitled to 225 dollars, because he credited the sum of 1825 dollars as the half profits on *Dodge* and *Webb's* adventures, whereas according to the adjustment with them those half profits were but 1600 dollars. But if, as we contend to have been the case, there was a complete severance of the joint property at *Bourdeaux*, and the loss happened after such severance, it was properly the loss either of *Dodge* and *Webb*, or of the plaintiff; and there is no good reason why we should refund money paid us fairly on a settlement made on correct principles.

The action stood continued *nisi* for advisement, and at the following March term in *Suffolk* the opinion of the court (excepting the *chief justice*, who did not sit in the cause) was delivered as follows by

SEWALL. J. The plaintiff's demands, when specified, are 1. The balance of his payments to *Dodge* and *Webb*, after deducting the net proceeds of the actual returns of their adventures in the brig *Pompey*.

2. A difference in the calculation of profits upon the same adventures: the profits, as taken at *Bourdeaux*, and there credited to the defendant, exceeding the estimated profits in the adjustment at *Salem*.

The damages and loss in that adjustment, sustained immediately by the plaintiff, were, it is said, an expense incurred in the voyage conducted by him for the benefit of the defendant, so far as the adventures of *Dodge* and *Webb* were concerned; and although a consequence of a breach of orders by the plaintiff in changing his destination, yet the defendant, by his subsequent assent in taking to the voyage as performed, and accepting the sales as *Bourdeaux*, and the investments made there of the proceeds, submits himself to all consequences; at least to all expenses fairly and necessarily incurred in the voyage, as it was eventually performed.

Admitting the justice of the plaintiff's claim in this view of it; still as it is not pretended that the award by referees chosen between *Dodge* and *Webb* and the plaintiff, without the concurrence of the defendant, is conclusive upon him, the whole question between the parties in the case at bar remains open, and is to be decided upon the evidence now adduced. And to entitle the plaintiff, it must appear that the defendant was originally liable upon his contract with *Dodge* and *Webb* for the carriage of their adventures, under circumstances and in a case, which would not entitle the defendant to any recourse against the plaintiff, as master of the vessel, to the amount recovered against him by *Dodge* and *Webb*.

It seems to have been understood that *Dodge* and *Webb* were entitled, and that they in fact recovered against captain *Gilchrist*, in consequence of the change of destination in his passage from *Sumatra*, without taking advice at *Cowes*. This was done contrary to the orders agreed upon with the owners, and contrary to the tenor of the bills of lading signed at *Sumatra*. The advantageous sales of the pepper taken for the owners and freighters at *Sumatra* were the inducement for the deviation; but where the master had no discretion allowed him, this inducement afforded no justification, until the proceeding was sanctioned by the assent of the concerned. Such a change in the destination might have proved a loss of insurance both to the owners and freighters. And it is well understood, that one consequence of a voluntary deviation from the course of the voyage agreed upon is, that the owners and master of the vessel employed incur the risk

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of the goods carried on freight: and another consequence is that the freighter is not to be compelled to receive his goods at any other than the place of destination. But although the shipper is not to be compelled, yet he is entitled to receive, and may, if he will, demand his goods at the port where they may happen to arrive after a voluntary deviation: and his receipt of them there determines the risk of the carriers, who become entitled to their hire and commission, as upon a strict fulfilment of their contract(2).

The destination of the *Pompey*, or the market in *Europe*, to which she was to proceed from *Cowes*, depended upon the advice of Mr. *Williams*. He was equally the agent, in this respect, of the owners and of Mess. *Dodge* and *Webb*, who for the purposes of this enquiry are to be considered in the light of freighters. Mr. *Williams* appears to have expressed some disapprobation of the conduct of captain *Gilchrist* in proceeding to *Bourdeaux*, or rather in fixing his market by his contract at the *Isle of France*. But after full information of that contract, and after the arrival of the vessel at *Bourdeaux*, he notifies his authority from *Dodge* and *Webb*, and requires the compliance of captain *Gilchrist* in the disposal of their adventures, and the remittance of the proceeds. These directions from the agent of Mess. *Dodge* and *Webb* governed the subsequent proceedings of captain *Gilchrist*, and by one of his letters referred to in the case stated, he expressly advises his owners, that he shall remit and bring to *America* all the property, which he had not positive orders to remit to *London*. This shews at least his understanding of the directions he had received from Mr. *Williams*. These directions were an acceptance by *Dodge* and *Webb* of their adventures at *Bourdeaux*, and the distinct deposit with *Strobel* and *Martenez* for the purposes of remittance to *London* was a separation of the proceeds of the sales at *Bourdeaux*. It became impossible for captain *Gilchrist* to manage afterwards the adventures of Mess. *Dodge* and *Webb*, and the shipments for his owner as a joint concern. If in the manner of this deposit, or the continuance

(2) *Abbott on Shipping, Part* 3. c. 7. § 8

of it, captain *Gilchrist* was chargeable with unfaithfulness, indiscretion or gross neglect: although he might thereby become liable to Mes *Dodge* and *Webb*, yet that would not be in a case, where the captain could have recourse for an indemnity against his owners.

Upon the whole, the court have not been able to perceive the grounds of the award between the plaintiff and Mess. *Dodge* and *Webb*, or how they became entitled to refuse the actual returns of their adventures under the circumstances proved in the case at bar: or how captain *Gilchrist* became liable to them for an inevitable loss happening, as the case now appears, without any gross neglect or misconduct on his part. But in any view of the case that has been suggested, the acceptance by *Dodge* and *Webb* of the proceeds of the sales at *Bourdeaux*, appearing from what is proved of the intervention of Mr. *Williams*, determined the responsibility of the owners of the *Pompey*, and of the defendant upon his contract, for the carriage and disposal of their adventures.

This opinion determines also the question made upon the other items of the plaintiff's demands. If the proceeds of the sales at *Bourdeaux* were lawfully deposited there to the account of *Dodge* and *Webb*, according to their share in the concern; and if the different destination of the owners' and the freighters' property necessarily separated their concern, then the amount of profits to be divided between *Dodge* and *Webb* and the defendant, upon his contract for the carriage of their adventures, was determined, and the proportion due to the defendant was justly placed to his credit: and no after estimate of the profits could operate to change the state of the account. Besides, the plaintiff at that time credited only what he had received, and what he had no title to retain on his own account. He cannot claim this reimbursement as an indemnity; for it made no part of his payments to *Dodge* and *Webb;* nor has he paid by mistake any sum to the defendant, for which he can be considered accountable to the plaintiff.

The verdict is to be set aside, and it is the opinion of the court, that the plaintiff is not entitled, from the facts stated, to recover upon either of his demands against the defendant.

HUMPHREY BARTLET

versus

MARY DELPRAT AND OTHERS.

The declarations of a supposed grantor in a deed after the date of the deed, as "that he had never made the deed," &c. cannot be given in evidence, against the party claiming under such deed after the grantor's death.

THIS was a real action, in which *Humphrey Bartlet* demanded against the tenants possession of certain lands in *Newbury* in this county, and was tried upon the general issue of *never disseized*, before *Sewall, J.* at the last April term in this county, when a verdict was rendered for the tenants.

The demandant excepted to certain evidence admitted at the trial, and upon that ground moved for a new trial. From the exceptionss filed it appear that the demandant, to prove the issue on his part, relied upon a supposed deed from his father *Moses Bartlet* deceased (who was also the father of the tenants, and under whose last will they claim, and are seized of the demanded premises,) whereby the same tenements, at a date long before the said will, had been conveyed by *Moses*, the father, to his son *Humphrey*, the demandant, to hold to him and his heirs and assigns in fee, from and after the death of his father. To prove this deed and conveyance, the demandant offered a copy from the county registry, with certain fragments of a writing purporting to be remains of the original deed there recorded. This mutilated writing contained the signatures of the grantor and the subscribing witnesses, one of whom was the magistrate who took the acknowledgment of the deed: and it was agreed that all the persons named as witnessing the execution were dead, and had died before the registry of the supposed deed.

The demandant then gave some evidence to the handwriting of the signatures, and the copy of the registry, and the fragments were permitted to be read and given in evidence to the jury.

The tenants on their part gave in evidence the will of the father, *Moses Bartlet*, some testimony respecting the supposed signatures of the grantor, witnesses and magistrate, contradictory to the testimony of the demandant's witnesses on that subject. And it appeared that the demandant had never claimed, or intimated any title in the demanded premises dur-

ing the life of his father. The tenants were then permitted to give in evidence certain declarations of the father in his lifetime, subsequent to the date of the supposed deed to the demandant; particularly, when speaking of the demanded premises, and the disposal of his estate among his children, "that he had never made, and had refused to make to his son *Humphrey* a deed of the premises in controversy;" "had given him his full share in his estate in another manner," which he mentioned; "and intended the premises in controversy for the son and daughter," to whom he afterwards devised them, *viz.* the present tenants.

The exceptions filed by the counsel for the demandant went particularly to the declarations and sayings of the said *Moses*. The cause stood continued to this term upon the demandant's motion for a new trial: and now

Story, in support of the motion, argued that the evidence was received, either as the declarations of the grantor, or as hearsay, and that in either view it ought to have been rejected.

1. As the declarations of the grantor. The general rule is, that no party can be admitted as a witness to disprove his own deed, either as fraudulent, forged, or executed by him while insane(1). So no party can be admitted to testify in support of his own right, or where he claims an interest(2). If in the case at bar the grantor had been alive, he could not, consistently with these principles, have been sworn to prove the facts: *a fortiori* his mere declarations, made without the solemnity of an oath, cannot be received.

It is true that in this state (contrary to the established law in *England*) (3), it has been settled, that in criminal trials the party, whose name has been forged, may be a witness to prove the forgery, and this from the necessity of the case (4). But this rule has never been extended to civil actions.

The only cases, in which the declarations of persons have been admitted as evidence, are either where they were dying

(1) *Peake on Evid.* 96. 104. 105.
(2) *Cowp.* 621.—1 *Mod.* 21.—*Doug.* 139.—*5 Term. R.* 578.—*Peake on Evid.* 120.
(3) *Peake on Evid* 96.
(4) 3 *Mass. Rep.* 82.

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declarations of a party disinterested ; or the declarations of a party charging himself, or restraining his own right thereby ; or declarations making part of the *res gestæ*. Of the first class is the case of *Wright* vs. *Little*(5),where the dying declarations of a witness to a deed were admitted to shew that the deed was forged : and the ground was, because if produced at the trial, he might have been examined to that point, and his declarations only took away the presumption of a due execution of the deed. Of the second class is the case of *Barry* vs. *Babbington*(6), where the entries of a deceased steward of money received by him in satisfaction of trespasses committed on a waste of his lord were admitted, for he became chargeable thereby. So *Head* vs. *Horton*(7), where the entries of deceased town officers, of money received from another town for their proportion of church taxes, were admitted. Thus also in *Davis* vs. *Pierce* (8), the declarations of a tenant at the time he was in possession, of whom he held, were admitted. Of the third class is the case of *Aveson* vs. *Kennaird*(9), where the declarations of the wife, as to the state of her health, at a time when a policy was about to be underwritten on her life, were admitted in an action of the policy ; for her declarations at the time were a part of the *res gestæ*, and were part of the means by which then to ascertain her real state of health.

But the declarations of a party interested, unless in restraint of his own right, are not evidence in cases of this nature. Therefore in *Outram* vs. *Moorewood*(10), the entries of the deceased owner of land, of money paid by a tenant were rejected in an action between third persons claiming a right to dig coals in the land under other persons. So the declarations and depositions of a deceased pauper are not evidence as to his place of settlement(11).

(5) 3 *Burr. Rep.* 1255, *cited by lord Ellenborough in* 6 *East's Rep.* 195.
(6) 4 *Term R.* 514.
(7) 4 *Term R.* 669.
(8) 2 *Term R.* 53.—*Bull. N. P.* 295.
(9) 6 *East's R.* 188.
(10) 5 *Term R.* 121.
(11) *Rex* vs. *Eriswell*, 3 *Term R.* 707.—*Rex* vs. *Nuneham Courtney*, 1 *East's R.* 373.—*Rex* vs. *Chudderton* 2 *East's R.* 27.—*Rex* vs. *Terryfrystone*, 2 *East's R.* 54.—*Rex* vs. *Abergwilly*, 2 *East's R.* 63.—*Rex* vs. *Erith*, 8 *East's Rep.* 539.

2. As mere hearsay the declarations were inadmissible. Lord *Kenyon*, in *Rex* vs. *Eriswell* before cited, has forcibly expressed our view of the subject. It being a general rule that hearsay is not evidence, "the evidence offered in "this case must be rejected, unless an exception in favour of "it has been adopted in such a manner as to incorporate it "into the law of evidence."—"Evidence should be given "under the sanction of an oath legally administered, and in "a judicial proceeding between the parties affected by it, or "those who stand in privity of estate or interest with them." The exceptions are of those things which are proveable by reputation, such as cases of pedigree, prescription or custom(12). So to prove a right of way, or an estate parcel of a manor(13), or the boundaries of a parish(14).

But these exceptions are all strictly construed, and are not to be favoured. Therefore though pedigree may be proved by hearsay, the place of birth cannot be(15). So neither can a presentation, nor a title to lands(16). And as none of these exceptions apply to the case at bar, it must fall within the general rule.

Banister for the tenants. We certainly admit the general rule as to hearsay evidence to be as stated. But the exceptions to the rule are very numerous. In the cases, for example, cited from the Term Reports, the declarations were admitted, where no other evidence was to be had. And it seems to be settled that when no evidence is left but the party's own declarations, they may be received in certain cases.

In the present case the grantor and witnesses are all dead; and it is believed that no case can be produced, where the declarations of one not interested have been refused: and the person, whose declarations were admitted at the trial of this cause, was in fact not interested: they were occasional, accidental and unbiassed. His will, by which he devised part of the land in controversy to the tenants at a date pos-

(12) *Cowper*, 591. *Bull. N. P.* 233, 294, 295.—*7 Term R.* 3. *note a.*
(13) *Bull. N. P.* 295.
(14) *Rex* vs. *Hammersmith*, *Peake on Evid. App.* 172.
(15) *Rex* vs. *Erith*, 8 *East's R.* 539.
(16) *Rex* vs. *Eriswell*, 3 *Term R.* 707.

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terior to that of the supposed deed, was no more than his solemn declaration, and no one doubted that it was properly admitted in evidence(17).

Prescott, on the same side, pressed the argument that the last will of the father was nothing but a more solemn declaration that he had never conveyed the land in question: it rests on the same principles: the testator declared the same thing at one time by his will, and at other times verbally.

These declarations come strictly within the exception relating to that species of evidence which comes under the description of a part of the *res gestæ*, and are within the case of *Aveson* vs. *Kinnaird:* they were made at the time of the act done, and they ought to go to explain it.

Unless a witness is interested in the event of the suit, he is competent to give evidence. But it cannot now be objected, that *Moses Bartlet* was interested in the event of this action. No evidence could be obtained in the present case, but a comparison of handwriting, and the declarations of the party: and the declarations of a party, though not under oath, may be used to rebut the presumption arising from comparison of hands(18). The case referred to was the case of a witness: and it is very clear that *Moses Bartlet* might have been a witness in this action. His interest, if he had any, was in favour of the demandant rather than against him. The observations of lord *Mansfield*, in the case of *Wright* vs. *Littler & al.*(19), are strongly in point for the tenants.

Story in reply. The argument that the declarations prove no more than the will, is not correct: and if it were, they might have weighed materially in the minds of the jury, and the demandant is entitled to a new trial without any prejudice from them. These declarations were not made at the time of the execution of the deed, but long afterwards, and can in no sense be considered as part of the *res gestæ*.

It is said that the grantor had no interest, and that therefore his declarations were admissible. He claimed a right in the land, and could not have been a competent witness to

(17) *Bull. N. P.* 290.—2 *Leon.* 231.—2 *Lord Raym.* 1008.
(18) 6 *East's R.* 195.
(19) 3 *Burr.* 1255.

prove his title in an action unless released. The vendor cannot disprove his own deed. If the deposition of *Moses Bartlet* had been taken *in perpetuam memoriam*, it could not have been used in this case on account of this objection; and can his naked declarations be better evidence?

The case cited from lord *Raymond* was a mere *nisi prius* decision of no great authority, and if correct in point of law, is inapplicable to the case at bar. There it was held that a vendor might be a witness to prove that he had no title, because that was swearing against himself. But in the case at bar the witness must swear to support his own title; and the case in 5 *Term R.* 578. is decisive that a man claiming an interest cannot be a witness.

But it is said that these declarations only rebut a presumption, arising from the comparison of hands, that the deed was duly executed. Such declarations are admitted from a subscribing witness alone, and from him only when made *in extremis:* but never from the party executing the deed.

The cause stood continued *nisi* for advisement, and at the succeeding March term in *Suffolk* the opinion of the court was delivered to the following effect by

SEWALL, J. [After stating the evidence admitted at the trial.] Against this evidence of the father's declarations the demandant objects, on the ground that they are of the nature of hearsay evidence, and are the words of a party to the supposed deed, who, when speaking them, had an interest in declaring as he did.

The ground of admitting this evidence was, that the witnesses spoke to the fact, that declarations had been made by the father, which declarations were inconsistent with the claim and title of the demandant; were made at a time when no controversy existed respecting the land now in question; and were made by the person occupying the land relative to the nature and extent of his occupancy and title.

The evidence objected to has some analogy to a sort of evidence sometimes received, and justified by the authorities: particularly the declarations of tenants respecting their occupancy, when the seizin of the proprietor, or the extent of his boundaries, or of the appendages of his estate are in

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dispute(20); and one case has been cited, where a conversation of a supposed tenant, respecting her payment of rent, was given in evidence to prove the seizin of the party to a fine, under which a defendant in ejectment claimed title, although it was decided by the court that the tenant herself was an incompetent witness, because liable for the mesne profits(21). And it may be observed, that generally declarations of persons not on oath, when admitted as evidence, are taken as facts in themselves, from which presumptions may arise for or against the facts in controversy. And the evidence objected to in the case at bar seems, at the first view, to be competent for the like purpose.

But no case has been found, where the declarations of a supposed grantor, or party in an instrument, and who may be considered as interested at the time to declare in the particular manner testified to, has been admitted, even for the purpose suggested. And although we find precedents, in controversies respecting last wills, of declarations by the supposed testators received in evidence(22); yet we find no instance of the declarations of grantors in deeds admitted as evidence under circumstances in many respects similar.

And upon the whole, although the other facts appearing in this case leave very little doubt of the justice of the verdict; yet as the competency of the evidence excepted to is not supported by any of the authorities we have examined, we think the verdict must be set aside and

A new trial granted.

Note. At April term 1809, upon a trial before *Sewall, J.* a verdict was again found for the tenants, upon which judgment has been rendered.

(20) *Walker* vs. *Broadstock*, 1 *Esp. Rep.* 458.—*Auriol & al.* vs. *Thomas*, 2 *Term R.* 53.—*Hindly* vs. *Rickarby*, 5 *Esp. Rep.* 4.
(21) *Fostor* vs. *Williams*, *Cowp.* 62.
(22) *Cowp.* 52.

A TABLE

OF THE PRINCIPAL MATTERS.

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ACTION.
1. Upon an express promise to pay the factor of any one, for the use of the principal, the factor may maintain an action in his own name. *Van Staphorst & al.* vs. *Pearce.* 258

2. Money paid pursuant to the award of the commissioners under the treaty of 1794, between the *United States* and *Great Britain*, was to be paid over according to the interests of the concerned: and where a sum was awarded nominally to one, the interest of which was in another, that other is entitled to the benefit intended, and may recover the money in an action for money had and received. *Heard, assignee* vs. *Bradford.* 326

3. The remedy against a publick officer for neglect or misbehaviour may be by an action of the case alleging his misdemeanor, or by an action of debt, according to the nature of the misfeazance, but never by *assumpsit*, as on an implied promise to do his duty. *M'Millan* vs. *Eastman.* 378

4. Chattels are conveyed by a debtor to his creditor, with authority to sell them for cash, if the debt should not be paid at a stipulated time: He sells them for promissory notes payable at a future day, and sells the notes for cash at a discount. He shall account only for the cash actually received by him. *Hyde* vs. *Cross.* 404

5 No action lies to recover damages sustained by being sued in a civil action, unless it was malicious and without probable cause. *White* vs. *Dingley.* 433

6. Where a son had built a house on the land of his father, under an expectation that the father would devise the land to him, the father is not answerable to the son, or to his creditors upon a foreign attachment, for the value of the house. *Wells & al* vs. *Bannister & al. & trustee.* 514

7. A. owns a room on the lower floor of a dwelling house, and the cellar under it; and B. owns the chamber over the room, and the remainder of the house: the roof becoming ruinous, B. makes the necessary repairs: held that no action lies against A. for contribution to expense of such repairs. *Loring* vs. *Bacon.* 575

8. If one grant land as bounded on a thirty feet street, with a privilege of passing in said thirty feet street; and at the time of the grant the grantor had a building on other land of his, which projected ten feet into the street; no action lies for the grantee for the continuance of such obstruction. *Clap & al.* vs. *M'Neil.* 589

9. A supercargo engages to transport goods at his own risk against all dangers, excepting those of the seas, and dispose of them to the best profit of the consignor, and render his reasonable account: the goods arrive in safety at the place of destination, and are there stolen out of a store where they were deposited for sale: He was held to account to the consignor for the value at the place of shipment, deducting the agreed commission. *Bridge* vs. *Austin.* 115

See EVIDENCE. 4. 5.
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ACTION QUI TAM.
1. If two executors are named in a will, they knowing of their appointment, and the will is not presented to the probate court within thirty days from the death of the testator, an action for the forfeiture incurred by statute of 1783, c. 24. § 16. may be sued against them jointly, or perhaps sev-

erally, although but one forfeiture can be recovered. *Hill & ux.* vs. *Davis & al.* 137

2. But if the neglect be in one of the executors only, he alone incurs the forfeiture, and is alone to be sued. *ibid.*

3. A man and his wife cannot recover in a popular action sued in their joint names. *ibid.*

4. Where a statute imposes a penalty for taking fish, and gives an action of debt *qui tam* for its recovery, if several join in taking the fish, a recovery and satisfaction against one of the offenders is a good bar to an action brought against the others. *Boutelle* vs. *Nourse.* 431

5. In a *qui tam* action for the penalty inflicted by the statute of 1788, c. 65. for a rescous, the defendant cannot give in evidence the illegality of the distress. *Melody* vs. *Reab.* 471

ADVANCEMENT.

1. Where one by deed, purporting to be made for a valuable consideration, conveyed to his son certain lands in fee, and the son, by his deed of the same date, acknowledging himself satisfied as his share of the father's estate, acquitted and discharged the estate from any demand thereon as heir; the son died, and afterwards the father dying intestate, the children and heirs of the son bring their action for their distributive share of their grandfather's estate, and it was held an *advancement* to the son in full, and that the grand children were barred. *Quarles & al.* vs. *Quarles.* 680

ADMINISTRATION.

See Executors and Administrators. 4.

APPEAL.

1. Appeals from the court of common pleas must be from the final judgments of that court; except in the case of an interlocutory judgment in abatement, account, or partition, which are specially provided for by statute. *Lamphear* vs. *Lamprey.* 107

2. But if the court below arrest the judgment, or send the parties out of court without giving any judgment, in cases where an appeal lies, the aggrieved party may claim an appeal, and this court will sustain it, although the court below disallow it. *ibid.*

3. The *month* within which an appeal from the probate court must be claimed, is a calendar month. *Avery & al.* vs. *Pixley.* 460

4. No appeal lies to this court from the common pleas in a criminal proceeding brought into that court by appeal from a justice of the peace. *Commonwealth* vs. *Messenger.* 462

See Error. 1. 6.

ASSUMPSIT.

See Action. 1. 2. 3.
Practice. 12.

ATTACHMENT.

1. The sherriff cannot retain goods, attached by him on mesne process, after judgment is rendered for the defendant, although the plaintiff reviews the action. *Clap* vs. *Bell.* 99

See Foreign Attachment.

AVERAGE.

See Insurance. 9.

BANKRUPT.

1. If the holder of a promissory note prove his demand under a commission of bankrupt issued against the first endorser; and afterwards, but before any dividend is declared under the commission, receive payment of the note from the second endorser, and then receive a dividend under the commission, he shall account to the second endorser for the amount of such dividend, and not to the creditors of the bankrupt. *Selfridge* vs. *Gill & trustee.* 95

2. Where the payee of a negotiable promissory note exhibits and proves his demand under a commission of bankruptcy issued against the promisor, upon a dividend declared the assignee of the bankrupt is liable to attachment as the trustee of the payee, notwithstanding the note afterwards appears to have been negotiated to a third person. *Decoster* vs. *Livermore.* 101

3. Where money belonging to A. was in the hands of B. who also held a demand in favour of a creditor against A. with directions to make an attachment of A.'s property, it was agreed between A. and B. that B. should retain the money for the use of A.'s creditor, and should cause A.'s property to be attached, and that this agreement should be reduced to writing: this was not done, and A. becoming bankrupt his assignees recovered the money of B. in an action for money had and received. *Foster & al. assignees, &c.* vs. *Lowell.* 308

See Evidence. 2.

BARON AND FEME.

See Action qui tam. 3.
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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In an action by an endorsee against an endorser of a promissory note, the plaintiff is not held to prove a demand on the promiser, if it appears that he had absconded before the note was payable. *Putnam & al.* vs. *Sullivan & al.* 44

2. A promissory note not negotiable, given in consideration of a balance found due upon an *insimul computassent*, is not of itself a payment, nor a bar to a recovery in an action on the *insimul computassent*. *Greenwood* vs. *Curtis*. 93

4. A promissory note is not entitled to *grace*, by the laws of this state, unless made payable with grace. *Jones* vs. *Fales*. 245

5. If payment of a promissory note, made payable with grace, be demanded of the maker before the last day of grace, the endorser is not holden. *ibid.*

6. A promissory note made payable in *foreign bills* is not a cash note, and therefore not negotiable. *ibid.*

7. An endorser of a bill of exchange is entitled to notice of the bills being dishonoured, notwithstanding the insolvency and obsconding of the drawer. *May* vs. *Coffin*. 342

8. If an endorsee of a promissory note receive it under circumstances, which might reasonably create suspicions that it was not good; as if he receive it after payment has been refused, or some time after it is payable, or if the endorser is not to be liable on his endorsement; the endorsee takes it subject to any legal defence, which might be made against a recovery by the promisee. *Ayer* vs. *Hutchins & al.* 370

9. Where the promisee of a note, payable at a day certain, contracts, at the time the note is given, not to demand payment of it, until a certain time after its maturity; such contract is a collateral promise, for the breach of which, if there were a legal consideration, an action may lie; but it will be no bar to an action on the note, when due by the terms of it. *Dow* vs. *Tuttle*. 414

See BANKRUPT. 1. 2.
EVIDENCE. 1.

BILLS OF LADING.
See ACTION. 9.

BILL OF SALE.

1. A *bona fide* conveyance by deed, of a vessel and cargo abroad at the time, is valid against creditors, provided the vendee take possession thereof without delay upon the return of the vessel. *Portland Bank* vs. *Stacy & al.* 661

2. There is no difference between the *grand bill of sale* of a ship used in *England*, and the bills of sale in common use in this country for the same purpose. *ibid.*

BLOCKADE.
See INSURANCE. 1.

BOND.
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BOOK DEBT.

1. A book debt for goods sold is assignable in equity. *Dix & al.* vs. *Cobb & al. & trustee*. 508.

See EVIDENCE. 8. 9.

BOUNDARIES.
See DEED. 1. 5.

CERTIORARI.

1. A committee of the court of sessions for locating a highway report a sum as damages to be paid to A. B. without shewing by what town it is to be paid, or in what town the way is: the sessions accept the report: afterwards on the petition of A. B. they order the damages to be paid by the town of C. before the next term, or a warrant of distress to issue: upon motion of the town of C. the proceedings on the original petition only were brought before the court upon a *certiorari*: the court quashed the *certiorari* as having issued improvidently. *Commonwealth* vs. *New Milford*. 446

2. This court will not grant a *certiorari* for defects of form in the proceedings of the sessions for establishing a highway, after it has been located, accepted and made. *Ex parte Miller*. 565

3. Of the costs on the denial of a motion for a *certiorari*. *Ex parte Cushman*. 565.

See ERROR. 4.

COMMITTEE.
See FISH-WAYS. 1. 4. 5.

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See APPEAL. 1. 2. 4.

CONFISCATION.
See CONSPIRATORS & ABSENTEES.

CONSPIRATORS AND ABSENTEES.

1. The laws made against conspirators and absentees before the adoption of the constitution of the commonwealth, are not repealed by the declaration of rights. *M'Neil* vs. *Bright & al.* 282

2. A writ of possession was not necessary to complete a judgment in favour of the state under the laws against absentees. *ibid.*

3. If a judgment of confiscation under the absentee laws was rendered after the treaty had provided that no future confiscations should take place, such judgment is valid, unless reversed by writ of error. *ibid.*

CONSIDERATION.
See DEED. 3. 4.

CORPORATION.
1. If an execution issue against an aggregate corporation, by the name of "The President, Directors, and Company," &c. with directions to the officer for want of estate to take their bodies, the officer cannot arrest a member of the company by virtue of such execution. *Nichols* vs. *Thomas*. 232

COSTS.
1. The provision of the statute of 1803. c. 155. § 5. respecting costs extends to actions brought up on demurrer by agreement as well as those in which there has been a verdict in the court below. *Wightman* vs. *Hastings*. 244
2. Costs are not given on a writ of error where the judgment is reversed for error in law. *Brown* vs. *Chase*. 436
3. A plaintiff is entitled to costs against the defendant after a default, until a final decision, whether one sued as trustee of the defendant shall be held as such or not. *Wells & al.* vs. *Bannister & al. & trustee*. 514
4. If a feme sole plaintiff intermarry pending the action, the defendant pleading this in abatement shall recover his costs. *Haines* vs. *Corliss*. 659
See REPLEVIN. 3.
INSOLVENT ESTATES. 4.
CERTIORARI. 3.
FOREIGN ATTACHMENT. 8. 9. 15.
DAMAGES. 3.

COVENANT.
1. When a committee appointed by the directors of a turnpike corporation covenant under their hands and seals, to pay money to one who contracts to make part of the turnpike, they are personally liable on such covenant. *Tippets* vs. *Walker & al.* 595
See ACTION. 8.
DEED. 3. 4. 7.
EXECUTION. 5.
DAMAGES. 1.
EVIDENCE. 7.
LETTER OF LICENSE. 1.

DAMAGES.
1. For the breach of a covenant of seizin the damages due are the value of the land at the time of the conveyance, and interest thereon to the time of the judgment. *Caswell* vs. *Wendall*. 108
2. In trespass *quare clausum fregit* against several where the evidence was of three distinct trespasses, each of which was committed jointly by some of the defendants only, (all of them being on the close at the same time,) part of them were defaulted, and part pleaded not guilty: the damages for each trespass were rightly assessed jointly against those who jointly committed it: and the damages for the several trespasses were rightly assessed severally. *Proprietors of the Kennebeck Purchase* vs. *Boulton & al.* 419
3. In such case the costs are to be taxep jointly against all the defendants. *ibid.*
See ACTION. 5. PRACTICE. 3.
EXECUTION. 5. 8.
DEED. 7.
REPLEVIN. 2. 3.

DECLARATION.
See PLEADING. 1. 4. 5. 8. 11.
PRACTICE. 4.

DECLARATION OF RIGHTS.
See PRIVILEGE.
CONSPIRATORS, &c. 1.
PARISHES AND RELIGIOUS SOCIETIES. 3.

DEED.
1. Land is described in a conveyance to A. as bounded on B.'s land: B. owned at the time a piece of land, and had contracted to purchase another piece adjoining, which he occupied as his own, but had received no conveyance of it at the time of the conveyance to A. although he had paid the price for it: it was held that A.'s land was bounded by the land *owned* by B. and not by that *occupied* by him. *Crosby* vs. *Parker*. 110
2. The words, "*with all the buildings thereon*," in a conveyance of land, have no legal effect. *ibid.*
3. If one, for a valuable consideration, bargain and sell land with warranty, to hold from the grantor's death, no action lies during the grantor's life to recover the consideration money paid; but an action on the covenant may lie after the death of the grantor, if a title to the land be not made to the grantee or his heirs. *Wallis, Exx.* vs. *Wallis*. 135
4. If such bargain and sale be made by a father to a son, the law will presume a consideration of natural affection from the consanguinity of the parties, in addition to the valuable consideration expressed in the deed, and construe it a covenant of the grantor, to stand seized to his own use during his life, and after his death to the use of the grantee. *ibid.*
5. When the description of an estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no es-

tate will pass, except such as will agree to every particular of the description: but if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. *Worthington & al. Exrs.* vs. *Hylyer.* 196

6. A grant to one and his heirs and assigns of all the trees and timber standing and growing in a close forever, with free liberty to cut and carry them away at pleasure, conveys an estate of inheritance in the trees and timber:—and the grantee may maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees. *Clap* vs. *Draper.* 266

7. A paramount right is an incumbrance within the meaning of a covenant in a conveyance of land that the same is free of all incumbrances; and in an action on such covenant, if the plaintiff has, at a fair price, extinguished the incumbrance, such price shall be the measure of the damages: if the plaintiff has not removed the incumbrance, but it still remains against his title, he shall recover nominal damages only. *Prescot* vs. *Trueman.* 627

See ACTION. 8.
BILL OF SALE. 1.
DEFEAZANCE. 1.
ADVANCEMENT. 1.
EVIDENCE. 11, 14.

DEFEAZANCE.

1. A writing without seal cannot operate as a defeazace of a deed under seal. *Kelleran* vs. *Brown.* 443

DEPRECIATION.

See MONEY. 1.

DISSEIZIN.

1. To constitute a disseizin of the owner of uncultivated lands, the entry and occupation of the disseizor must be such, that the owner may be presumed to know that there is a possession adverse to his title. *Proprietors of the Kennebeck Purchase* vs. *Springer.* 416

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

1. In the assignment of dower, the commissioners are to regard the rents and profits only. *Leonard* vs. *Leonard.* 533

See SEIZIN. 4.
INTESTATE ESTATE. 1.

DWELLING HOUSE.

See ACTION. 6, 7.

ERROR.

1. A writ of error does not lie upon a judgment of a justice of the peace, from which judgment an appeal lies to the court of common pleas, nor upon a judgment of the court of common pleas, where an appeal lies to this court. *Savage* vs. *Gulliver.* 171

2. A writ of error must be sued within twenty years from the time when the title to it accrued, or within five years after the *same* disability, which existed at that time, has ceased. *Eager & ux.* vs. *Commonwealth & al.* 182

3. A writ of error does not lie upon a process before a justice of the peace under the militia law. *Pratt* vs. *Hall.* 239
Edgar vs. *Dodge.* 670

4. If a writ of error has issued in a case where a *certiorari* ought to have been moved for, the court sometimes look into the proceedings, and if an error is found, for which a *certiorari* would have been granted, they will quash the proceedings: otherwise they will quash the writ of error as having issued improvidently. *Pratt* vs. *Hall.* 239

5. A writ of error does not lie to reverse a judgment against a defendant out of the commonwealth, because the plaintiff sued out his execution, without giving bond pursuant to statute of 1797, c. 50. *Johnson* vs. *Harvey.* 483

6. An agreement of a defendant in a suit pending in the court of common pleas, that he will not appeal from a judgment rendered against him by that court in such suit, does not preclude him from bringing his writ of error on such judgment. *Putnam* vs. *Churchill.* 516

7. An administrator *de bonis non cum testamento annexo* cannot maintain a writ of error to reverse a judgment recovered by the original executor. *Grout* vs. *Chamberlin.* 611

See PLEADING. 11.
CONSPIRATORS, &c. 3.

ESCAPE.

1. An agreement to indemnify an officer against a voluntary escape is void, as against the policy of the law. *Ayer* vs. *Hutchins & al.* 370

ESTOPPEL.

See SETTLEMENT. 5, 6.
PLEADING. 7.

EVIDENCE.

1. Endorsers of a negotiable security are incompetent witnesses to prove it usurious. *Churchill* vs. *Suter.* 156

2. In an action between other parties, the petitioning creditor is a competent witness to prove his own debt, upon which a commission of bankruptcy was awarded. *Farrington* vs. *Farrington.* 237

3. The affidavit of a peritioner for a review is not received, except as to facts exclusively known to himself, or to obtain an order of notice. *Rogers* vs. *Hill.* 349

4. In an action upon a covenant of warranty of lands, the court will receive parole evidence of an ouster:—and the plaintiff will recover in such action, although he may have voluntarily yielded to dispossession; provided the title, to which he yielded, be good and paramount to that of his warrantor. *Hamilton* vs. *Cutts & al. exrs.* 349

5. But in such case the burthen of proof will be on the plaintiff.——If the eviction be by a judgment of law, such judgment will be plenary evidence, unless it was obtained by fraud. *ibid.*

6. A plan of land taken *ex parte* cannot be used on a trial but as chalk. *Bearce* vs. *Jackson, admr.* 408

7. The grantor of land, who covenanted in his deed that he had good right, &c. to sell the same, and that he would warrant the premises against all persons claiming them under him, is a competent witnes for the grantee in an action brought by him for the land against one who does not claim under the same grantor. *Twambly* vs. *Henley.* 441

8. How far original entries by the party in his own handwriting, supported by his oath are to be received as evidence in *assumpsit* for goods sold and delivered. *Prince, admx.* vs. *Smith.* 455

9. They are no evidence of payment of money to third persons by the defendant's order, nor of such demands as in their nature afford a presumption that better evidence exists. *ibid.*

10. One cannot be sworn as a witness, who would testify under an impression that he is interested in the event of the suit, although he has in fact no legal interest in such suit. *Plumb* vs. *Whiting.* 518

11. Under the provincial act of 9 W. 3. c. 7. for registering deeds and conveyances, in case of the absence or death of the grantor without acknowledgment of the deed, its execution must have been proved by two of the subscribing witnesses previous to its registry. *Pidge* vs. *Tyler & al.* 541

12. Upon an indictment for having in possession a counterfeit bank note, it is not sufficient for witnesses to swear to the identity of the note, unless it has been constantly in their possession, or they have but a private artificial mark upon it before parting with it. *Commonwealth* vs. *Kinison.* 646

13. A. being in the service of B. and having engaged to pay his own board, applied to C. to board him, and proposed to him to take his pay in goods out of B.'s store; to which B. consented, and promised that he should be so paid: in an action by C. against B. for the board of A. this latter was offered as a witness for the plaintiff, and these facts coming out on examining him upon the *voir dire*, he was rejected as interested in the event of the suit. *Emerton* vs. *Andrews.* 653

14. The declarations of a supposed grantor, made after the date of the deed, as "that he never made the deed," &c. cannot be given in evidence, against one claiming under such deed, after the death of the grantor. *Bartlet* vs. *Delprat & al.* 702

15. A letter of guardianship of a *non compos*, issued after the inquisition required by the statute, is *prima facie* evidence that the ward was not of sound mind. *White, admr.* vs. *Palmer.* 147

See Action qui tam. 5.
Bills of Exchange, &c. 1.
Libel. 1, 2.
Marriage and Divorce. 4, 5.

EXAMINERS. 410. 454.

EXECUTION.

1. Lands specifically devised are liable to be taken in execution by a creditor of the testator, equally with other lands of which he died seized. *Wyman* vs. *Brigden.* 150

2. Lands of a deceased testator are liable to be levied upon by a creditor, notwithstanding the executor, being residuary legatee, has given bond to pay the debts and legacies. *ibid.*

3. So lands in possession of the alienee of a devisee. *ibid.*

4. The extent of an execution on lands gives the creditor an actual seizin of the lands. *ibid.*

5. If an execution against the estate of a deceased testator be levied on lands in possession of an alienee of a devisee, and within the year be redeemed by the alienee: in an action of covenant against the devisee, the alienee will recover as damages the redemption money and interest. *ibid.*

6. When goods sufficient to satisfy a judgment are seized on execution, the debtor is discharged, although the sheriff waste the goods, or misapply the money arising from the sale of them, or does not return the execution. *Ladd* vs. *Blunt.* 402

7. But if the execution be extended on the debtor's land, his title is not affected until seizin is delivered to the creditor; and the title of the latter is not complete, until the return is made of the extent and and delivery of seizin. *ibid.*

8. The lands of a deceased testator being liable to be levied on to satisfy the debts which he owed, the conveyance of those lands by the devisee does not defeat the lien of the creditor, but they may be taken from the purchaser; and the delivery of seizin by the sheriff is an eviction of the tenant; whose damages are to be measured by the value of the land at the time of the eviction, with the addition of interest. *Bigelow* vs. *Jones, admx.* 512

See CORPORATION. 1.
EXECUTORS AND ADMINISTRATORS. 5.

EXECUTORS AND ADMINISTRATORS.

1. The probate court, in adjusting the account of an executor or administrator, is competent, having satisfactory evidence before it, to require an allowance of assets not inventoried or credited. *Selectmen of Boston* vs. *Boylston.* 318

2. It is doubtful whether the provision in *stat.* 1783, c. 32. § 12. extends to executors and administrators. If it does, it extends only to an examination for the purpose of discovery. *ibid.*

3. When an executor or administrator refuses to return an inventory, or being summoned, and in answer to interrogatories, denies that any personal estate of the deceased has come to his hands, the only remedy for those claiming benefit from the estate, is by action at law on the bond of the executor or administrator. *idid.*

4. The widow of a deceased intestate is exclusively entitled to the administration of his estate, unless there be among his next of kin a suitable person, whom the judge of probate may think fit to join with her in the trust, or to commit administration solely. *M'Gooch* vs. *M'Gooch.* 348

5. When the estate of one deceased is not insolvent, a creditor, who has obtained a judgment against the estate of the deceased in the hands of his administrator, may levy his execution on real estate fraudulently conveyed by the deceased: or the administrator, being licensed to sell the estate of his intestate, may sell estate so conveyed, in whose hands soever it may be. *Drinkwater* vs. *Drinkwater admr.* 354

6. Lands of a deceased intestate are not liable for the charges of administration. *ibid.*

7. An administrator, as such, cannot maintain an action to recover possession of the real estate of his intestate, except such as was mortgaged to him. *ibid.*

8. Neither can an administrator defend in any real action brought against him in that capacity by any one claiming as a purchaser from the intestate, whether the purchase was *bona fide,* or fraudulent as to creditors. *ibid.*

9. If an administrator binds himself to convey part of his intestate's land, it is no legal defence to an action upon the obligation, that the estate being insolvent he has sold the land, under a license of court, to the highest bidder, the obligee being present and requesting him so to do: nor that since making the obligation the whole of the land has been covered by a townway legally laid over it; although this latter may avail the defendant upon a hearing in equity. *Fairfield* vs. *Williams & al.* 425

10. Under the statute of 1788, c. 51. an executor or administrstor, to whom land is set off on execution, takes an estate in such land in trust for the heirs, &c. and neither the legal estate, nor the possession vests in the heirs, until the land is apportioned and distributed in the probate office or until the administration has been settled, or it is ascertained that the land will not be wanted to discharge debts, &c. and the administration bond is security for the faithful administration of such land, it being only a substitute for money due to the testator or intestate: and the executor or administrator may maintain an action for the same land against a stranger in possession. *Boylston, admr.* vs. *Carver.* 598

11. A judgment recovered by an executor is no bar to an action brought by the administrator *de bonis non cum testamento annexo* for the same cause. *Grout, admr.* vs. *Chamberlin.* 613

12. Where one of the parties to an action, which by law survives, dies pending the action, and his executor or administrator becomes a party pursuant to the statute of 1783, c. 59. § 1. and afterwards the other original party dies, the action still pending, his executor or administrator may become a party; and if he neglect so to do after notice, judgment will be entered against the estate of his testator or intestate. *Hunt* vs. *Whitney, admr.* 620

13. A creditor of an intestate, having recovered judgment against his estate in the hands of an executor *de son tort,* cannot extend his execution, issued upon such judgment, on the lands of which the intestate died seized. *Mitchel* vs. *Lunt.* 654

14. The duties of an executor devolve on an administrator *cum testamento annexo,*

where the authority is not necessarily connected with a personal trust or confidence reposed in the executor. *Farwell* vs. *Jacobs, admr.* 634

See ACTION QUI TAM. 1, 2.
ERROR. 7.
LEGACY. 4.
INSOLVENT ESTATES. 1, 2. 4.
PRACTICE. 8.

EXTORTION.
See PLEADING. 4. 5.

FACTOR.
See ACTION. 1. 9.
FOREIGN ATTACHMENT. 12.
INSURANCE. 2.

FATHER AND CHILD.
See GUARDIAN. 1, 2.
DEED. 4.

FELONY.
1. An assault with intent to murder is not a felony, either at common law, or by statute of 1804, c. 123. *Commonwealth* vs. *Barlow.* 439

2. If one, to whom a waggon load of goods, consisting of several packages, is delivered to be transported from one place to another, fraudulently take away one of the packages, such taking is felony. *Commonwealth* vs. *Brown.* 580

FENCES.
1. The owner of a close is not obliged to fence it, but against cattle lawfully in the adjoining ground; and if all his fence be insufficient, yet if cattle do not escape through the insufficient fence, but are turned in, he may lawfully distrain them damage feasant. *Melody* vs. *Reab.* 471

FISHERIES.
1. Towns adjoining on, or extending across a navigable river may own the soil of the flats, or even of the channel, if a grant has been obtained of the government: but the property in the fish, and also in the tidewaters, is in the public. *Coolidge* vs. *Williams.* 140

2. But by the common law here, towns may appropriate the fish, if not appropriated by the legislature: yet for taking the fish no one can lawfully go on the soil of another without leave. *ibid.*

3. If no appropriation be made of the fish, any citizen may take them, so that he does not trespass upon the land of others. *ibid.*

4. Where two towns adjoin a river, the citizens of either town may take the fish swimming in the tidewaters. *ibid.*

5. The town of *Randolph* has no claim to a share of the avails of the fishery in *Braintree*, of which it was formerly a part, under a provision of a statute which gives them their proportionable part of all the property of *Braintree*, of what kind or description whatever. *Randolph* vs. *Braintree.* 315

FISHERMEN.
1. Fishermen on board vessels of more than ten tons burthen are exempted from military duty. *Edgar* vs. *Dodge.* 670

FISHWAYS.
1. If the legislature appoint a committee to cause alterations to be made in the fishways in a river, and order a portion of the expense of such alterations to be borne by the owners of the dams where the alterations shall be made, such owners are not held to pay a portion of the expenses of such committee. *Stoughton & al.* vs. *Baker & al.* 522

2. A grant of a dam and wear upon a river, with the exclusive right to take fish in the river below the dam, does not preclude the public from a right to have a convenient passage way for the fish to ascend the river to the ponds. *ibid.*

3. Every owner of a mill-dam holds it under the limitation that a sufficient and reasonable passage way shall be allowed for the fish; and this limitation is not extinguished by any neglect of the government in compelling the owner to comply with it. *ibid.*

4. The government may compel such compliance by their committee: but if a prostration of the mill-dam, not within such limitation, be made by such committee, the owner may have a remedy by action at law. *ibid.*

5. Such committee may cause the necessary alterations to be made under their direction; but they are not personally answerable to those whom they employ: and as the exercise of their authority is personal, it cannot be delegated to any other person, or even to one of their own number. *ibid.*

FOREIGN ATTACHMENT.
1. It is a reprehensible practice to insert the name of a fictitious trustee in a foreign attachment, in order to give to the court in one county a jurisdiction of the suit, the defendant and the other trustees living in another county. *Barker* vs. *Taber & al. & trustees.* 81

2. The question whether trustee or not depends solely on the sworn answers of the persons summoned to the interrogatories: and the court will not receive a statement of facts agreed to by the plaintiff, defendant and trustees. *ibid.*

3. The exhibiting to one summoned as trustee in a foreign attachment, a letter of one not a party to the suit, nor claiming the property, and authenticating its signature, but not its contents, by the oath of the trustee, is not enough to introduce the contents of such letter, as facts disclosed by the trustee. *Stackpole* vs. *Newman & al. & trustee.* 85

4. A promise to perform labour for another to a certain amount is not a credit liable to a foreign attachment, until the promise be broken: after the promise is broken, the agreed value of the labour will be held on the attachment. *Wrigley* vs. *Geyer & al. & trustee.* 102

5. A judgment debtor, against whom an execution may issue, is not liable to an attachment as the trustee of the judgment creditor. *Prescott* vs. *Parker.* 170

6. But if, being so attached, he discloses the judgment as effects or credits of the principal debtor in his hands, he is not held to pay interest on the judgment, because he has not unjustly detained it. *ibid.*

7. If one summoned as trustee declares that he has accepted a draught in favour of his principal, which *he thinks* was payable to order, he will be adjudged trustee, having funds to respond the draught. *Sebor* vs. *Armstrong & trustee.* 206

8. If one summoned as trustee out of his own county, he being the only trustee summoned, appear to the writ, and move to stay proceedings against him as trustee, or pray judgment whether he shall be holden, he will be discharged as of course, and will be entitled to costs, and perhaps to extra costs within the equity of the statute. *Wilcox* vs. *Mills.* 218

9. If he does not appear, but is defaulted upon the original process, he cannot plead the same matter in abatement to the *scire facias*, but must submit to an examination: he cannot still be charged beyond the value of the effects in his hands at the time of the first summons. But if it appears that he had no effects at that time, he will not be held to pay costs; but will recover costs, because sued out of his own county. *ibid.*

10. A *contingent credit* is not subject to a foreign attachment. *Willard* vs. *Sheafe & trustee.* 235

11. A debtor, against whom an action is pending for the recovery of a debt, and who was summoned after issue joined and before verdict, cannot be held as the trustee of his creditor in a foreign attachment, in virtue of such debt. *Kidd* vs. *Shepherd.* 238

12. Where the debtor of A. has made an express promise to pay the debts to A.'s factor, the debtor cannot be held as the trustee of A. in a foreign attachment. *Vanstaphorst & al.* vs. *Pearce.* 258

13. The answer of a trustee in a foreign attachment must be received as true: and if he answer falsely to discharge himself, the plaintiff's only remedy is by a special action of the case, under the 9th section of the statute of 1794, c. 65. providing this process. *Whitman* vs. *Hunt & trustee.* 272

14. The promisor in a contract not negotiable, but which is assigned in equity, cannot be held as the trustee of the promisee after the assignment: but the assignment must be known to the trustee, and disclosed by him on his examination, or he will be held. *Foster* vs. *Sinkler & trustee.* 450

15. Of costs for a trustee in a foreign attachment. *Wilcox* vs. *Mills.* 507

See BANKRUPT. 2.
COSTS. 3.

FORGERY.

1 Where a merchant entrusts his clerk with his blank endorsements, and one by false pretences obtains and uses them, such fraudulent use of them is not forgery: nor is it such a fraud, as will discharge the endorser as against the endorsee. *Putnam & al.* vs. *Sullivan & al.* 44

FRAUD.

1. The maxim, that a party shall not be received to aver against his own deed, does not apply to the case of a deed obtained by fraud. *Bliss & al.* vs. *Thompson.* 488

2. The common law requires good faith in all contracts, and where one overreaches another by false allegations or fraudulent concealments, the law will compel him to pay over the money obtained by such means to the party, to whom in equity and good conscience it belongs. *ibid.*

FRAUDS. (STATUTE OF)
See STATUTES.

FREIGHT.

1. When and to whom freight is payable. *Lane* vs. *Penniman & trustee.* 91

2. Where goods are shipped for half the profits in lieu of freight; if by reason of a loss of a part of the goods there is no absolute profit on the whole adventure, the owner of the ship is not entitled to any part of the particular profits arising on that portion of the goods which are not lost. *Pearce* vs. *Phillips.* 672

3. Specie was shipped on a voyage from the *United States* to *Sumatra* and back to

Europe, under a contract with the owners of the ship to receive half the profits in lieu of freight. At *Sumatra* the property of the owners and shipper was invested in a cargo for *Europe*; where, upon the sale thereof, the supercargo caused them to be credited with their respective proportions of the proceeds. The share of the owners was duly remitted to them, with half the profits on the adventure of the shipper; who having directed a particular appropriation of his share, the same remained in the hands of a merchant, by whose failure a loss accrued thereon. This was held to be the loss of the shipper, of which the owner was not liable to bear any part. *Gilchrist* vs. *Ward*. 692

See INSURANCE. 8.

GAOL YARD.

1. The sessions have no authority to extend the limits of the gaol yard beyond the land of the county, with the highways adjoining or leading to the prison. *Baxter* vs. *Tabor*. 361

2. If a debtor in prison, having the liberty of the yard, be suddenly seized with illness in the highway, and be necessarily carried to a private house; this is no escape within the condition of his bond, if he return to the prison as soon as he has reason and strength, or if he die before. *ibid.*

GUARDIAN.

1. The father of minor children, having property of their own, is notwithstanding bound to support them, if he has ability: otherwise of the mother. *Dawes, Judge, &c.* vs. *Howard & al.* 97

2. Where a father, having little or no property of his own, takes the guardianship of his minor children so situated, he will be allowed a reasonable charge for their board in his family during their minority. *ibid.*

3. Under the statute of 1791, c. 60. the guardian of a person *non compos* may, on being duly licensed therefor, lawfully sell in fee simple the estate tail of his ward during his life, for the payment of his debts, and by such sale the estate tail is extinguished, and the remainders legally barred. *Williams & al.* vs. *Hitchborn & al.* 189

4. *Assumpsit* lies against a spendthrift under guardianship, in which he may defend by his guardian. *Brown* vs. *Chase*. 436

HIGHWAYS.

1. The sessions are bound to notify the town, in which an alteration of an highway is prayed for, previous to an adjudication of the common convenience and necessity of such alteration. *Commonwealth* vs. *Cambridge*. 627

See SURVEYOR OF HIGHWAYS. 1.
CERTIORARI. 1. 2.

INCUMBRANCE.
See DEED. 7.

INDICTMENT.
See EVIDENCE. 12.
FELONY. 1, 2.
JUSTICE OF THE PEACE. 3.

INFANT.
See GUARDIAN. 1. 2.
MILITIA. 3.

INSIMUL COMPUTASSENT.
See BILLS OF EXCHANGE, &c. 2.

INSOLVENT ESTATES.

1. When an executor or administrator has represented the estate of his testator or intestate to be insolvent, and a commission is thereupon awarded, there is an *apparent* insolvency: when a distribution is decreed, the insolvency becomes *absolute*. *Hunt* vs. *Whitney, admr.* 620

2. In an action brought against an executor or administrator during an apparent insolvency, the defendant may abate the plaintiff's writ, by pleading the insolvency, and admitting the creditor's demand: if he dispute the demand, the plaintiff may have judgment, but not execution: if the action be commenced before an apparent insolvency, it shall be continued until it shall appear whether there is, or is not *such* an insolvency, and if there is, the plaintiff, as before, may have judgment, but not execution. *ibid.*

3. The second exception in section 2 of the statute of 1788, c. 66. applies only to cases, in which an apparent insolvency has taken place within the year. *ibid.*

4. If pending an action commenced for a just cause against an executor or administrator, an absolute insolvency of the estate of the testator or intestate takes place, and the whole estate, being legally appropriated, furnishes no dividend to the creditors, the plaintiff cannot have judgment: neither can the executor or administrator recover costs. *ibid.*

INSURANCE.

1. If an insurance be effected against the perils arising from a blockade, supposed to exist in a foreign port, and in fact no blockade existed at the time, or while the ship remained at such foreign port, the insurance is void, and the premium shall be returned. *Taylor* vs. *Sumner & al.* 56

2. If a policy of insurance be effected in the name of A. as agent for B. this latter cannot maintain an action upon the policy to recover a loss for the use of C. whom he declares alone interested in the property insured. *Russell* vs. *The N. E. Marine Insurance Company.* 82

3. When an abandonment is offered to underwriters by the assured, it is not necessary to produce evidence of the loss under oath. *Munson* vs. *The N. E. Marine Insurance Company.* 88

4. Where by the terms of a policy of insurance a loss is payable at a given time after notice thereof, if at the time of abandonment the assured had a right to recover for a total loss, this right will not be affected by the credit thus given to the assurers in the payment of the loss, although in the mean time it has ceased to be total. *ibid.*

5. Whether the obligations and rights of the parties to a policy of insurance are determined by the actual state of the facts or of the intelligence received, at the time of an offer to abandon, *quaere.* *Dorr* vs. *The N. E. Marine Insurance Company.* 221

6. Where the moiety of a building, which was insured by the *Massachutetts Mutual Fire Insurance Company*, was conveyed in fee, the grantor reserving a term of seven years therein: and the grantee immediately reconveyed the same to the grantor in mortgage: and the mortgagee demised them to the mortgagor and another for seven years reserving rent; it was held that the company was liable in case of a loss, notwithstanding such conveyances. *Stetson* vs. *Mass. Mutual Fire Insurance Company.* 330

7. Where a building insured by the same company was represented, at the time of effecting the insurance, as connected with another building on one side only, and before the loss happened, it became connected on two sides, the policy is not avoided, unless the risk thereby became greater. *ibid.*

8. Underwriters upon *freight* are not liable for a detention of the ship on the voyage, if she finally earns her freight. *Mayo* vs. *The Maine Fire and Marine Insurance Company.* 374

9. When in the course of a voyage a ship insured, being damaged by winds and storms, voluntarily seeks a port to refit, the expenses consequent thereon, including the provisions and wages of the seamen during the detention, are a general average; but the repairs are a distinct charge upon the ship. *Padelford & al.* vs. *Boardman.* 548

10. Where an insurance is made by one in his own name only, on property valued, and it afterwards appears that the assured was owner but of a moiety: he shall recover but for a moiety of the sum insured in case of a loss. *Dumas* vs. *Jones.* 647

11. Of the reasonable time after receiving intelligence of a loss, within which the insured must abandon, to entitle him to recover for a total loss. *Smith* vs. *The Newburyport Marine Insurance Company.* 668

INTEREST.

See MONEY. 1.

INTESTATE ESTATES.

1. The judge of probate has no authority to settle lands assigned for dower, after the widow's term has expired, on one or more of the next of kin, to the exclusion of the others. *Hunt* vs. *Hapgood & al.* 117

See ADVANCEMENT. 1.

JUSTICE OF THE PEACE.

1. In a proceeding before a justice of the peace for an offence, the fact must be strictly charged, but a rigid adherence to forms will not be required. *Commonwealth* vs. *Messenger.* 462

2. Thus in a complaint against one for sabbath-breaking, it is sufficient to allege the fact on the Lord's day generally, and to conclude the complaint "against the stat- "utes enacted for the due observation of "the Lord's day:" so if the complainant does not shew on whose behalf he complains, nor what penalty the defendant has forfeited, nor how the forfeiture is appropriated. *ibid.*

3. A conviction by a justice of the peace, on the information of the party guilty of a breach of the peace, is no bar to an indictment for the same offence. *Commonwealth* vs. *Alderman.* 477

4. A *mittimus* or warrant of commitment from a justice of the peace ought to recite the complaint on which it is founded. *Commonwealth* vs. *Ward.* 497

5. A recognizance for keeping the peace should be taken returnable to the next court of common pleas: and when taken on a charge of a bailable offence, should be made returnable to the next court having jurisdiction of the offence. *ibid.*

See PLEADINGS. 11.
ERROR. 1. 3.

LAW MERCHANT.

See PARTNERS. 1.

LEGACY.

1. A legacy payable on a certain event does not carry interest, whether it be vested absolutely or on a contingency: except where it is bequeathed to a minor, whom the testator was under a moral obligation to support, and from whom no support is provided until the legacy is payable. *Duwes, Judge, &c.* vs. *Swan & al.* 208

2. A legacy was given to A. B. to be paid him on his attaining the age of 21 years: there was also a general direction in the will, that all the legacies should be paid with interest in three months from the testator's decease: it was holden that it was not the testator's intent to limit a time of payment of any of the legacies, but only to provide that they should be paid with interest, and to fix a time when the interest should commence. *ibid.*

3. Where a legatee, whether the legacy be specific or not, accepts a part of a legacy bequeathed, pursuant to an average or *pro rata* distribution of the property remaining in the hands of the executor, he has no further remedy for the part remaining unpaid, until further estate is discovered. *Sheple exr.* vs. *Farnsworth exr.* 632

4. A direction in a will to the executor *to support the testator's aged father in sickness and in health*, is a legacy, for which an action lies against the executor by the statute of 1783, c. 24. *Farwell* vs. *Jacobs, admr.* 634

LETTER OF LICENCE.

1. A creditor gives his debtor a licence for two years, and in the letter of licence covenants that he will not sue, &c. and that if he shall sue, the debtor shall be discharged of his debt: notwithstanding which he sues within the two years, and the debtor pleads the letter of licence in bar, and has judgment: he cannot afterwards maintain an action against the creditor on the covenant. *White* vs. *Dingley.* 433

LIBEL.

1. The truth of the words is no justification in a criminal prosecution for a libel. *Commonwealth* vs. *Clap.* 163

2. But the defendant may shew the purpose of the publication to have been justifiable, after which he may give its truth in evidence, to negative the malice and intent to defame. *ibid.*

3. Publications of the truth concerning the character of a public elective officer and relating to his qualifications for such office, made with intent to inform the people, are not a libel. And every one holding such an office may be considered as a candidate for re-election, if he does not disclaim it. *ibid.*

4. For the same reason the publication of falsehood and calumny against public officers and candidates is a very high offence. *ibid.*

LIMITATION.

See ERROR, 2.

MALICIOUS PROSECUTION.

See ACTION. 5.

MARRIAGE AND DIVORCE.

1. A charge of extreme cruelty and of adultery, may be joined in the same libel for a divorce, and the court will decree according to the evidence. *Young* vs. *Young.* 430

2. Where a libel for a divorce *a vinculo* alleges a fact of adultery on one day, the court will permit an amendment charging the fact on another day; and in such case the respondent will be entitled to a continuance. *Tourtelot* vs. *Tourtelot.* 506

3. A libel by a *feme covert* for a divorce must be subscribed by the libellant, and not by an attorney. *Willard* vs. *Willard.* 506

4. Proof of a second marriage, without evidence of cohabitation, is not of itself sufficient to maintain a libel for a divorce. *Remie* vs. *Remie.* 586

5. Unprovoked force and violence used towards a wife are sufficient evidence of extreme cruelty, to maintain a libel for a divorce *a mensa et thoro. French* vs. *French.* 587

6. Where upon a libel for a divorce *a mensa et thoro*, alimony is decreed, and made payable quarter-yearly, the court will not issue execution, without first making a rule to shew cause. *ibid.*

MILITIA.

1. A non-commissioned officer or soldier of the militia, for a default of appearing at a company muster, is liable to a fine of two dollars, and for a like default at a battalion or regimental muster, to a fine of four dollars, by statute of 1805, c. 114. and he is now liable to no other fines. *Savage* vs. *Gulliver.* 171.—*Pratt* vs. *Hall.* 239.—*Winslow* vs. *Anderson.* 376.—*Hussey* vs. *Lord.* 378

2. A master of a licensed vessel under twenty tons employed as a lighter in a harbour, and not going out to sea, is not exempted from duty in the militia, as a mariner in the sea service of a citizen of the *United States. Pratt* vs. *Hall.* 239

3. An infant may be sued for non-appearance at a military muster, and may answer personally as in case of an indictment. *Winslow* vs. *Anderson.* 376

4. A private in the militia is not discharged from the company to which he belongs, by an absence of six months from the brigade, without an intention of changing his domicil. *Commonwealth* vs. *Walker*. 556

5. If a private in a standing company enlist in a voluntary corps, although the standing company consists of less than sixty-four effective privates, or by such enlistment is reduced below that number, the enlistment is not void, and such private is not liable to do duty in the standing company, unless restored thereto by the brigadier general. *ibid.*

See ERROR 3. FISHERMEN. 1.

MILLS.

1. The common law writ *de reparatione facienda* lies for a tenant in common or jointenant against a cotenant only, and not against a reversioner. *Carver* vs. *Miller*. 559

2. Under the statute of 1795, c. 74. § 6. the only remedy against a part owner of a mill, who refuses to repair, is by reimbursement out of the profits: for which an action of account is the proper remedy: and this remedy does not lie against his heirs or assignees. *ibid.*

3. Where a tenant for life of a part of a mill agrees that his cotenant shall repair, and reimburse himself out of the profits of the mill, the profits are not answerable after the death of the tenant for life. *ibid.*

MINISTER.

See PARISHES AND RELIGIOUS SOCIETIES.

MINISTERIAL LANDS.

1. Ministerial lands lying in *Milton*, but belonging to *Dorchester*, are not liable to be assessed in the town taxes of *Milton*. *Capen* vs. *Glover & al.* 305

MINOR.

See GUARDIAN. 1, 2.

MITTIMUS.

See JUSTICE OF THE PEACE. 4.

MONEY.

1. In computing the amount due on a security for money given during the revolutionary war, when the current paper money was depreciated, and on which payments have been made in specie since the war, the original sum must first be reduced by the scale of depreciation, and interest cast on the reduced sum until the first payment. *Edes & al. admrs.* vs. *Goodrich*. 103

MONTH.

See APPEAL. 3.

MURDER.

1. Of murder and manslaughter. *Commonwealth* vs. *Drew & al.* 391

NEW TRIAL.

See PRACTICE. 1.

NON COMPOS.

See GUARDIAN. 3.
EVIDENCE. 15.

OFFICER.

See ACTION. 3.
ESCAPE. 1.
LIBEL. 3. 4.

PARENT AND CHILD.

1. A minor, whose father is dead, and his mother afterwards married, is entitled to his earnings in the service of a third person: the father in law may have an action on an implied *assumpsit* for necessaries, but cannot claim his earnings against the minor's consent. *Freto* vs. *Brown*. 675

2. Whatever rights or duties may belong to the mother as guardian by nature they do not devolve on her husband. *ibid.*

See GUARDIAN. 1, 2.

PARISHES AND RELIGIOUS SOCIETIES.

1. Persons assessed for the support of public worship in a parish, who have a right to have their monies paid over to a minister other than the minister of the parish, must notify the parish of their desire to have their monies so paid over, and the minister must demand the monies, within a reasonable time after the assessment is made: and a year from making such assessment is a reasonable time; but in particular cases the time may be extended. *Montague* vs. *The 1st Parish in Dedham*. 269

2. A person leaving the society in which the parish worship, and honestly and in good faith joining one of another religious denomination, is entitled to have his money paid over to the teacher, on whose instructions he attends, although he may have no conscientious scruples on the subject. *ibid.*

3. The legislature may, consistently with the third article of the declaration of rights, and with the statute of 1799, c. 87. set off a member of any religious incorporation to another religious incorporation, whether of the same or a different denomination. *Thaxter* vs. *Jones & al* 570

PARTITION.

1. A petition for partition ought not to include lands lying in different counties. *Ex parte Bonner.* 122

PARTNERS.

1. The law merchant respecting dorment partners does not extend to speculations in lands. *Pitts* vs. *Waugh & al.* 424

PLEADING.

1. A declaration in *assumpsit* laying the promise on a day posterior to the teste of the writ is well enough after verdict; although it would be bad on special demurrer. *Bemis* vs. *Faxon.* 263

2. In an action of *assumpsit* by a surety in a bond, who had paid a part of the debt, against the principal, the statute of limitations is a good plea. *Vinton & al. admrs.* vs. *Vinton.* 276

3. A plea in bar to an action of debt on bond, which admits the plaintiff's right to part of the debt is bad. *Fitzgerald* vs. *Hart & al.* 429

4. In an action against a sheriff for extortion in receiving illegal fees upon the service of an execution, a declaration, which describes the parties to, and the date of the execution, is sufficient after verdict. *Livermore* vs. *Boswell.* 437

5. So if it shews the sum received as fees, and the sum levied, without setting forth the whole transaction. *ibid.*

6. If the date of an original writ is posterior to the date of the service, this being matter in abatement is waived by the defendant's appearing and pleading the general issue. *ibid.*

7. If the tenant in a writ of entry, whereby a freehold is demanded, pleads the general issue, he thereby admits himself to be tenant of the freehold, and is estopped from proving that he is tenant at will only. *Kelleran* vs. *Brown.* 443

8. A declaration on a promissory note as payable to A. or bearer, and alledging the plaintiff to be the bearer, is sufficient without stating an express promise to the plaintiff. *Dole* vs. *Weeks.* 451

9. To an action on a promise to deliver certain specific articles at a given day and place, it is a good bar that the defendant was ready at the day and place to deliver the articles. *Robbins* vs. *Luce.* 474

10. In an action by the endorsee of a promissory note against the promiser, the defendant cannot tender his oath in verification of a plea of usury under the statute of 1783, c. 55. 516

11. If the record of a judgment of a justice of the peace refer to the writ on file, the court, on error brought to reverse such judgment, will consider the declaration in such writ as a part of the judgment. *Clap* vs. *Clap.* 520

12. A plea to a transitory action, alledging that neither of the parties lives within the county where the action is brought, is a plea in abatement to the writ, and must be filed before the jury is impannelled, pursuant to the statute of 1782, c. 11. § 6. *Cleveland* vs. *Welsh.* 591

13. In debt upon a recognizance to a party, taken before a justice of the peace, conditioned for prosecuting an appeal, it must be shewn that the justice had jurisdiction of the action, and that the recognizance has been entered of record in the common pleas: and the condition must be set forth, and the breach alledged. *Bridge* vs. *Ford.* 641

See EXECUTORS AND ADMINISTRATORS. 7, 8, 9. 11.
JUSTICE OF THE PEACE. 1, 2, 3.

POLICY OF INSURANCE.

See INSURANCE.

PRACTICE.

1. If upon the trial the judge, thinking the plaintiff's evidence insufficient to support his action, stops the defendant from producing his evidence, and the jury notwithstanding find a verdict for the plaintiff, the court will set aside the verdict, without the defendant's waiving his right of review, he having in fact had no trial. *Dunham & al.* vs. *Baxter.* 79

2. Where a witness is ignorant of the English language, an interpreter is sworn to explain the oath to the witness, and to interpret his testimony. The case of *Charles F. Norberg.* 81

3. The treble damages given by the provincial act of 1 *G.* 2. c. 4. are to be sued for in an action of trespass. *Prescott* vs. *Tufts & al.* 146

4. When a count is struck out of a declaration by leave of the court, the declaration must afterwards be considered as if the count struck out had never been introduced. *ibid.*

5. The affidavit of a petitioner for a review is not received, except as to facts exclusively known to himself, or to obtain an order of notice. *Rogers* vs. *Hill.* 349

6. A petition for a review abates by the death of the petitioner pending the petition; and his executor cannot be admitted to prosecute it. *Woodward* vs. *Skolfield.* 375

7. Upon an issue of *nul tiel record* of a judgment of the common pleas, this court does not direct the original record to be sent up, but receives copies attested by the clerk. *Ladd* vs. *Blunt.* 402

8. One *non compos mentis* defends in an action by his guardian, and dies pending the suit; the guardian can no longer appear in the defence, but the executor or administrator of the *non compos*, if the cause of action survives against him, must defend. *Whitney* vs. *Whitman.* 508

9. When a writ is returned by an officer as duly served, the defendant is estopped from denying the service.—And the court will *ex officio* take notice of the return. *Slayton* vs. *The Inhabitants of Chester.* 478

10. Exceptions to a verdict under the statute of 1803, c. 93. § 5. must be filed and allowed at the same term at which the verdict is rendered. *Pease* vs. *Whitney & al.* 507

11. The court will not always grant a continuance for the purpose of pleading specially. *Craigie* vs. *Mellen & al.* 587

12. Where an appellant had failed from accident to enter his appeal at the last term, the court permitted him to enter it now as of that term, the appellee consenting and the bail not being prejudiced, nor subsequent attachments affected thereby. *York* vs. *Noyes.* 645

See Foreign Attachment.
Justice of the Peace.
Referees. 1.
Partition. 1.
Probate Bond. 1.
Marriage and Divorce. 3.
Money. 1.

PRIVILEGE.

1. This court is competent to decide on a plea of privilege, pleaded by a member of the house of representatives, in bar to an action for slander. *Coffin* vs. *Coffin.* 1

2. The freedom of deliberation, speech and debate, secured by the declaration of rights to each house of the legislature, is rather the privilege of the individual members, than of the house as an organized body: being derived from the will of people, the members are entitled to it even against the will of the house. *ibid.*

3. The article securing this freedom ought to be construed liberally, that its full design may be answered: and it extends to every act resulting from the nature of the member's office, and done in the due execution of it; and exempts him from prosecution for every thing said or done by him as a representative, whether according to the rules of the house or not. *ibid.*

4. So if he is sitting on a committee in a lobby, or in a convention of the two houses out of the representatives' chamber. *ibid.*

5. A representative is not answerable in a prosecution for defamation, if the words charged were uttered in the execution of his official duty, although spoken maliciously; nor, if not uttered in the execution of his official duty; and not spoken maliciously, or with intent to defame. *ibid.*

PROBATE BOND.

1. In debt on a bond made by a guardian of two minors to the judge of probate, it appeared that the guardian had been cited to settle his guardianship account, but had neglected so to do: after the suit was commenced on the bond, the accounts were settled, and a balance found due from the guardian to one of the wards, and from the other ward to the guardian: the bond was adjudged to be forfeited, and execution awarded for the first ward for the balance found due to him, and for the other for nominal damages only, and a third execution for the costs for the use of the two wards jointly. *Dawes, Judge, &c.* vs. *Bell & al.* 106

See Executors and Administrators. 3.

PROBATE COURT.

See Appeal. 3.
Legacy. 3.
Executors and Administrators. 1, 2, 3, 4. 6.
Action qui tam. 1, 2.

RENOGNIZANCE.

See Pleading. 13.
Justice of the Peace. 5.

RELEASE.

1. What possession of *Flats* is sufficient to enable the tenant to take a release. *Hamblet & ux.* vs. *Francis.* 75

REFEREES.

1. A report of referees appointed pursuant to statute of 1786, c. 21. can be lawfully made respecting no matters not contained in the agreement of submission. *Tudor* vs. *Peck.* 242

REGISTRY OF DEEDS.

1. Although a deed of conveyance be not acknowledged or registered, yet the conveyance shall be good against a second purchaser with notice; and such notice may be either express or implied. *Farnsworth* vs. *Childs.* 637

2. Where a second *bona fide* purchaser had read a prior deed of conveyance, but the grantee neglected for two years to put it on record, and for personal reasons permitted the grantor to remain in the visible

possession and occupation of the land, the first purchaser was held not entitled to relief and the second purchaser entitled to the land. *ibid.*

REPLEVIN.

1. The action of replevin survives the death of the plaintiff, but not of the defendant. *Mellen & al.* vs. *Baldwin.* 480

2. The statute of replevins [1789, c. 26.] has prescribed six per cent. on the replevin bond as the measure of the defendant's damages, when the plaintiff shall fail to prosecute his suit; and when goods taken in execution are unlawfully replevied: in all other cases his damages are left to be assessed according to the magnitude of the injury. *Bruce* vs. *Learned.* 614

3. In replevin a verdict being found for the defendant, and damages assessed, the plaintiff reviews the action, and obtains a reduction of the defendant's damages; the defendant shall notwithstanding recover his costs. *ibid.*

RESCOUS.

See ACTION QUI TAM. 5.

REVIEW.

1. Where a defendant, against whom a judgment is given, reviews the action and gives a bond to prosecute his review to final judgment, and to pay the damages and costs, which the original plaintiff may recover upon the review, or the original judgment and interest thereon; and after entering the review becomes nonsuit: in an action upon the bond, the original plaintiff shall recover the amount of the first judgment with interest thereon. But whether the costs of the nonsuit, *dubitatur. Hicks* vs. *Atkins, admx.* 103

2. A writ of review does not lie upon a judgment of the court of common pleas rendered upon the report of referees appointed pursuant to the statute of 1786, c. 21. *Dickerson* vs. *Davis.* 520

3. Of granting a review. *Judd* vs. *Buchanan.* 579

4. Upon a review of an action, in which debt, damages or land is demanded, the party, in whose favour the error of the former judgment is corrected, is the prevailing party within the provision of the statute of 1784, c. 28. § 9. and is entitled to his costs. *Bruce* vs. *Learned.* 614

See EVIDENCE. 3.
PRACTICE. 5, 6.
REPLEVIN. 3.
ATTACHMENT. 1.

REVOCATION OF WILLS.

See WILL. 3.

RIVER.

See FISHERIES. 1, 2, 3, 4.

SALE AND DELIVERY.

1. If A. contracts to sell certain goods to B. on a credit, provided B. shall furnish a surety for the price, and delivers the goods without such surety furnished, but declaring that he should not consider them as sold until the security should be given, the property remains in A. notwithstanding such delivery. *Hussey & al.* vs. *Thornton & al.* 405

SCHOOL DISTRICTS.

1. Towns may alter the limits of, or subdivide any school districts, without changing the limits of all. *Richards* vs. *Daggett & al.* 534

2. If after the inhabitants of a school district have voted to raise money for building a school-house, and before the same is assessed, the town shall set off certain inhabitants, and form them into a separate district, such inhabitants are not liable to be assessed for the money so voted. *ibid.*

SEAMEN.

1. The penalty provided in the second section of the act of congress *for the government and regulation of seamen in the merchants service* is incurred by a desertion previous to the commencement of the voyage: and that provided in the fifth section of the act by a desertion during the continuance of the voyage. *Cotel* vs. *Hilliard.* 664

See MILITIA. 2.
SETTLEMENT. 9.

SEIZIN.

1. One in possession of land, claiming to hold it in fee simple, is sufficiently seized to enable him to convey: and if he warrant the land, no action lies against him on his covenant of warranty, until an eviction of the grantee or his assigns by a paramount title. *Bearce* vs. *Jackson admr.* 408

2. When one enters on land, claiming a right to it, and gains a seizin by his entry, his seizin extends to the whole parcel, to which he claims a right. *Proprietors of the Kennebeck Purchase* vs. *Springer.* 416

3. But when one enters without claiming a right, his seizin cannot extend farther than his visible occupation. *ibid.*

4. A. conveys land to his four sons in fee, who by his deed of the same date mortgage the same land to the father in fee, to secure the payment of a sum of money and also a maintenance for the father during his life; it was held that the two deeds were parts of the same contract, and that

the seizin of the sons was not sufficient to entitle the widow of one of them to her dower in the land. *Holbrook* vs. *Finney*. 566

See SETTLEMENT. 10.

SETTLEMENT.

1. Before the revolution the settlement of a slave always followed that of his master. *Winchenden* vs. *Hatfield*. 123

2. Slaves were not within the statutes relating to the warning of persons, in order to prevent their gaining a settlement; nor within the act of 7 *Geo.* 3. c. 3. which provides that no settlement shall be gained by residence. *ibid.*

3. But when manumitted, they could acquire a settlement in their own right, and if they had resided a year in the town where they were manumitted, they could not then be warned out. *ibid.*

4. If a person, before the statute of 7 *Geo.* 3. c. 3. had been duly warned to depart from a town, so as to prevent his acquiring a settlement in such town, and after the warning removed from the town, without an intention of returning, continuing long enough to have gained a new settlement, and afterwards came back and dwelt in the town he had been warned to leave, he must have been again warned within a year from his return, or he would have gained a settlement. *Chelsea* vs. *Malden*. 131

5. If the town of A. has incurred expenses in the support of a pauper, supposed to have his legal settlement in B. and the overseers of A. give notice thereof to the overseers of B. and request his removal: although the notice be not answered nor objected to, and the expenses are paid by the town of B. but the pauper is not removed; in an action against the town of B. for after expenses incurred by the town of A. in the support of the pauper, the defendants are not estopped to deny that the settlement of the pauper is in A. *Leicester* vs. *Rehoboth*. 180

6. In what cases a town is estopped from denying the settlement of a pauper. *Bridgewater* vs. *Dartmouth*. 273

7. When an act incorporating part of a town, and erecting it into a new town, provides that all the debts due to or from the original town, shall be divided between the two towns, in proportion to the state valuation; and that the poor, with which the original town was then chargeable, together with those then removed therefrom, and afterwards returning for support, shall be divided in the same proportion; the legal construction of such a provision is, that the debts are to be paid to or by the original town, who may be compelled by the new town to pay over to it its proportion of debts received, and may compel such new town to reimburse its proportion of debts paid; and that the charges of maintaining the poor, and not their persons, are to be divided, each town having a remedy against the other for a reimbursement of any excess of such charges beyond its due proportion. *Brewster* vs. *Harwich*. 278

8. Such a provision does not affect the settlement of any of the inhabitants of either of the towns. *ibid.*

9. Before the statute of 7 *Geo.* 3. c. 3. a mariner gained a settlement in a town, by making his home therein, and following the business of his profession therefrom. *Abington* vs. *Boston*. 312

10. A seizin of a freehold estate in right of his wife is sufficient to give one a settlement under the statute of 1789, c. 14. *Windham* vs. *Portland*. 384

11. No settlement could be gained in any town under that statute by residence and payment of taxes for five years; the statute not having continued so long in force. *ibid.*

12. Before the statute of 1793, c. 34. when a new town was formed of part of an existing town, the settlement of persons absent at the time of the incorporation of the new town continued in the old town, though their former dwelling was in that part, of which such new town is formed. *ibid.*

13. Where the territory of which a new town is composed was, before the incorporation, an unincorporated place, the incorporation *ipso facto* gives every one inhabiting there a legal settlement. *Bath* vs. *Bowdoin*. 462

14. But where the new town is formed from part of an ancient one, those settled in that place at the date of the incorporation are legally settled in the ancient town. *ibid.*

15. An inhabitant of a town, living in a part of it, which by an act of incorporation is formed into a new town, and not having a settlement in the old town, gains none by the incorporation. *West Springfield* vs. *Granville*. 486

16. Upon a father's gaining a new settlement, a child of full age voluntarily living with him does not gain such new settlement within the statute of 1793, c. 34. § 2. *Art.* 2. *Springfield* vs. *Wilbraham*. 493

17. Of the settlement of slaves. *Dighton* vs. *Freetown*. 539

18. Where a new town A. was incorporated out of an old town B. and the act of incorporation provided that A. should pay to B. a sum of money, as a consideration

for being exempted from any expense on account of paupers belonging to B. previous to the incorporation, except such as might thereafter be returned as paupers from some other town, or were born in, or formerly were inhabitants of that part of B. which constituted A.: it was held that the paupers returned to B. and not born in A. for whose support A. must pay, were those who, when they removed to other towns, removed from that part of B. forming A. and not such as might have once lived in A. not being born there, but before they dwelt in another town, removed and lived in B. whence they in fact emigrated. *Salem* vs. *Hamilton.* 676

SHERIFF.

1. A sheriff is answerable *civiliter* for the malfeasance or nonfeasance of his deputy in the duties enjoined on them by law, but not for the breach of a contract, made with a plaintiff, to do what by law they are not obliged to do. *Marshall* vs. *Hosmer.* 60

2. If a creditor endorses on an original writ a direction to the officer to attach sufficient estate of the debtor, or hold him to bail, it seems that the officer has an election to execute the writ in either way. *ibid.*

3. But if the creditor, notwithstanding such direction endorsed, on delivering the writ, gives verbal orders to the officer to attach certain specified property, he is bound to conform to such orders. *ibid.*

4. The creditor is not bound to go with the officer making the attachment; but if he direct goods to be attached not in possession of the debtor, or about which there is a dispute, he must give the officer an indemnity. *ibid.*

5. The sheriff's bond to the treasurer of the commonwealth is intended for the benefit of individuals, who may suffer by the malfeasance of the sheriff or his deputy, as well as for the benefit of the commonwealth: and the treasurer is a mere trustee of the bond for the use of those who may suffer by a breach of its condition, whether it be the commonwealth, or private persons. *Skinner, Treas.* vs. *Phillips & al.* 68

6. When a sheriff has arrested a debtor in execution, and committed him to prison, and the debtor afterwards takes the benefit of the poor prisoner's act, the sheriff is entitled to demand and receive his fees of poundage and travel of the creditor. *Boswell* vs. *Dingley.* 411

7. In an action against a sheriff for not seizing upon execution chattels, which he had attached on the original writ, it is a good defence, that such chattels were the property of strangers, and not of the debtor. *Fuller* vs. *Holden.* 498

See ATTACHMENT. 1.
PLEADING. 4, 5.
EXECUTION. 6.

SHIP.

See BILL OF SALE. 1, 2.

SLAVE.

See SETTLEMENT. 1, 2, 3. 17.

STATUTES.

1. Private statutes, made for the benefit of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others; unless such construction result from express words or necessary implication. *Coolidge* vs. *Williams.* 140

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5 Ric. 2. c. 5 (ditto) *ibid.*
27 Hen. 8. c. 16 (Enrolments) 543
1 & 2 Ph. & M. c. 3 (Slander, &c.) 164
13 Eliz. c. 9. (Commissioners of sewers) 175
21 Jac. 1. c. 19 (Bankrupts) 663
12 Car. 2. c. 24 (Certiorari) 176
17 Car. 2. c. 8 (Administrators) 612
22 Car. 2. c. 1 (Conventicles) 175
6 Geo. 1. c. 21 (Certiorari) 176
11 Geo. 1. c. 30 (ditto) *ibid.*

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SURVEYOR OF HIGHWAYS.

1. A surveyor of highways may recover against his town damages happening to him through a defect in the highways within his own district, unless the defect arose from his own neglect. *Wood* vs. *Waterville.* 422

TAXES.

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WILLS.
1. In the construction of a will, the court will give effect to all the words, without rejecting or controuling any of them, if it can be done by a reasonable construction not inconsistent with the manifest intention of the testator. *Dawes, Judge* vs. *Swan & al.* 208
2. But if a latter clause is repugnant to a former one, the latter clause must prevail, because it is the last determination of the testator: unless the apparent intention of the testator in other parts of the will leads to a different conclusion. *ibid.*
3. Of the revocation of a will. *Avery & al.* vs. *Pixley.* 460
4. Upon an appeal from a decree of the probate court approving a will, the will is to be proved in this court, as if the question had originated here: and the appellee, having the affirmative, is to open and close. *Buckminster & al.* vs. *Perry.* 593

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